Legislative Assembly of Ontario

Assemblée législative de l'Ontario

STANDING COMMITTEE ON

THE LEGISLATIVE ASSEMBLY

REPORT ON THE MUNICIPAL FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT, 1989

3rd Session, 35th Parliament
43 Elizabeth II

STANDING COMMITTEE ON
THE LEGISLATIVE ASSEMBLY

Ontario

LEGISLATIVE ASSEMBLY
ASSEMBLÉE LÉGISLATIVE

TORONTO, ONTARIO
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COMITÉ PERMANENT DE
L'ASSEMBLÉE LÉGISLATIVE

The Honourable David Warner, M.P.P.,
Speaker of the Legislative Assembly.

Sir,

Your Standing Committee on the Legislative Assembly has the honour to present its Report and commends it to the House.

Ron Hansen, M.P.P.
Chair

Queen's Park
December 1994

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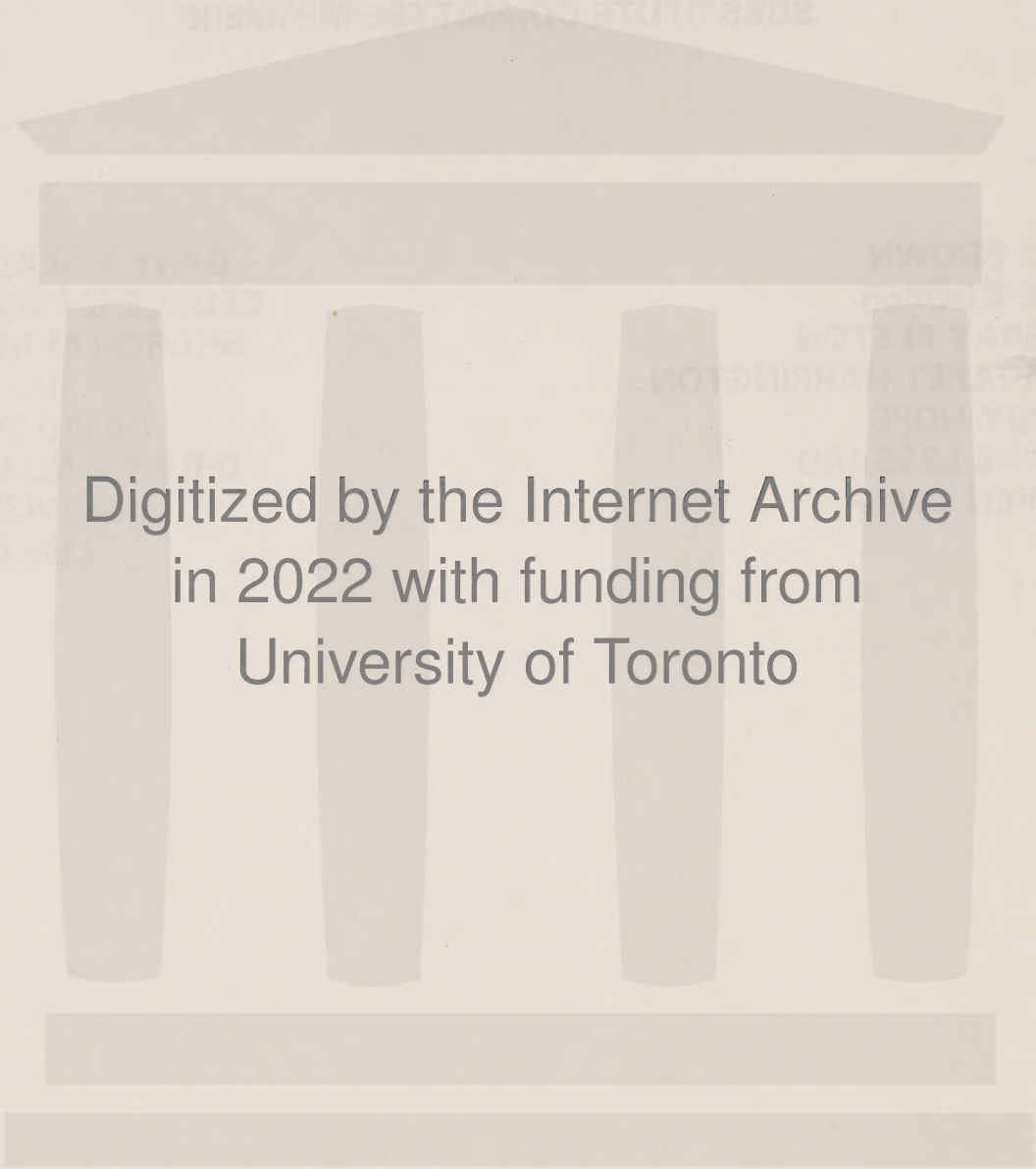

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STATUTORY ORDER OF REFERENCE

The order of reference to the Standing Committee on the Legislative Assembly to review the *Municipal Freedom of Information and Protection of Privacy Act, 1989* is set out in section 55 of the Act as follows:

> The Standing Committee on the Legislative Assembly shall, before the 1st day of January, 1994 undertake a comprehensive review of this Act and shall, within one year after beginning that review, make recommendations to the Legislative Assembly regarding amendments to this Act.

INTRODUCTION

Committee Mandate and Public Hearings

The Standing Committee on the Legislative Assembly began its comprehensive review of the *Municipal Freedom of Information and Protection of Privacy Act, 1989* in accordance with the statutory order of reference in December 1993. Public hearings were held during the weeks of January 17 and 24, 1994.

Prior to the hearings, the Committee had distributed by direct mail over 5000 notices of the hearings to all municipalities, school boards and other institutions, groups and individuals affected by the Act. The notice invited written and/or oral submissions concerning the Act.

The hearings began with oral presentations by the Chair of Management Board of Cabinet, the Minister responsible for the administration of the Act; staff from the Freedom of Information and Protection of Privacy Branch of Management Board; and from the Information and Privacy Commissioner. The Committee heard oral testimony and received written submissions from over 55 institutions, groups and individuals. At the conclusion of the Committee's hearings, the Information and Privacy Commissioner and the Freedom of Information and Protection of Privacy

Branch of the Management Board of Cabinet made final submissions to the Committee.

Following a review of the evidence and deliberations on the issues and recommendations received, the Committee drafted this report.

Legislative History of the Act

The *Municipal Freedom of Information and Protection of Privacy Act, 1989* (MFIPPA) was introduced for first reading on July 20, 1989. It received second reading and was referred to the Standing Committee on Administration of Justice on October 10, 1989. Third reading and Royal Assent were given on December 14, 1989 and the Act came into force on January 1, 1991. MFIPPA extended freedom of information and protection of privacy principles to more than 2500 local government institutions including municipal corporations, school boards, public utilities commissions, hydro-electric commissions, transit commissions, police commissions, conservation authorities, boards of health and other local boards. A list of the municipal institutions affected by the legislation has been compiled by Management Board Secretariat in a publication entitled *Directory of Institutions*.

The municipal Act is modelled on the provincial *Freedom of Information and Protection of Privacy Act, 1987* (FIPPA) which came into force three years earlier on January 1, 1988. FIPPA applies to provincial government ministries and many provincial agencies, boards, commissions and corporations, district health councils and community colleges. While the freedom of information and protection of privacy principles of the provincial Act have been adapted to local government institutions in MFIPPA, the structure and many of the provisions of the two Acts are identical.

The origins of both statutes can be traced to the report of the Commission on Freedom of Information and Individual Privacy, commonly known as the Williams

Commission after its Chair, Dr. Carlton Williams. Established in 1977, the Commission was mandated to study and report on ways and means to improve the public information policies, relevant legislation and procedures of the Government of Ontario. It published its findings and recommendations in 1980 in a report entitled *Public Government for Private People*. Among its 141 recommendations, the Williams Commission proposed that municipal governmental institutions be subject to the same freedom of information and protection of privacy principles as apply to provincial government institutions.

In 1991, the provincial Act underwent a comprehensive review by the Standing Committee on the Legislative Assembly similar to that currently being conducted of MFIPPA by the Committee. The result of the 1991 review was a detailed Committee report containing 81 recommendations for amendments to the Act and to implementation practices and procedures.

Overview of the Act

The legislative purposes of the *Municipal Freedom of Information and Protection of Privacy Act* are set out in section 1 as follows:

- to provide a right of access to information under the control of institutions in accordance with the principles that:
    - information held by institutions should be available to the public,
    - necessary exemptions from this general right of access should be limited and specific, and
    - decisions on the disclosure of government information should be reviewed independently; and
- to protect the privacy of individuals with respect to personal information about themselves held by institutions, and to provide individuals with a right of access to that information.

To give effect to these dual purposes, the competing interests of the public's right of access to information and the individual's right of privacy with respect to his or her personal information must continuously be balanced in order to determine which right should prevail and in what circumstances.

Section 4 of the Act establishes the general right of access to records that are in the custody or under the control of an institution. Access to personal information is similarly guaranteed by section 36 and includes the right to request that the information be corrected.

An "institution" is defined in section 2(1) to include municipal corporations and other local government bodies such as school boards, public utility commissions, hydro-electric commissions, transit commissions, library boards, police commissions and any other agency, board or commission designated as an institution in the regulations.

A person's right of access under the Act to records held by these institutions is not absolute. Specific exemptions from the right of access are set out in sections 6 through 15 and section 38. The exemptions are regarded as necessary to facilitate government decision-making and to protect the inherent confidential nature of certain information.

These exemptions are of two types - mandatory and discretionary. A mandatory exemption requires the head of an institution to refuse to disclose a record which is subject to the exemption. Mandatory exemptions under the Act apply to records which contain information relating to: relations with governments, third party commercial information and personal information.

All of the other exemptions in the Act are discretionary, meaning that the head of the institution may, in certain circumstances, disclose the record despite the exemption. Discretionary exemptions exist for records containing information relating to: draft by-laws or the substance of deliberations of a statutorily

authorized private meeting of a council, board or commission; advice by employees; law enforcement; economic and other interests of the institution; solicitor and client privilege; danger to safety or health; and information soon to be published. Under section 38, access to one's own personal information is also subject to a discretionary exemption in respect of specified types of personal information.

Although it is recognized that these exemptions are necessary to protect the confidentiality of certain types of information, the Act stipulates that they should be "limited and specific" so as not to unduly restrict the public's right of access. To this end, the legislation imposes a duty to disclose as much of the information as can reasonably be severed from the exempted portion of the record.

Two public override provisions prevail over the exemptions and impose a positive duty on the head of an institution to disclose information. Section 16 provides that certain of the exemptions will be overridden "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption." Section 5 requires the head to disclose a record that reveals a grave environmental, health or safety hazard to the public where the head has reasonable and probable grounds to believe that it is in the public interest to make the disclosure.

The Act tries to prevent the unnecessary collection and use of personal data for purposes for which the information was never intended, or for purposes about which individuals providing the information were never informed. The collection of personal information by an institution therefore is prohibited unless the collection is expressly authorized by statute, used for the purposes of law enforcement or is necessary for the proper administration of a lawfully authorized activity. The Act also strictly regulates the subsequent use, disclosure, retention and disposal of personal information.

MFIPPA requires the head of each institution to make available for public inspection an index of all personal information banks in the custody of the institution including the types of information maintained, how it is used, to whom the information is disclosed on a regular basis, a record of any uses and disclosures of the information.

Responsibility for determining whether or not a record may be disclosed rests with the head of the governmental institution which has the custody or control of the requested record. The actual receiving and processing of access requests is handled by an employee of the institution who has been designated as the institution's Information and Privacy Coordinator.

As a general rule the head of the institution must render a decision on whether or not to disclose a record within 30 days of receiving the request. Institutions may extend this time limit for a "reasonable" period in certain circumstances.

Any decision of a head of an institution may be appealed to the Information and Privacy Commissioner, an independent Officer of the Legislative Assembly. The Commissioner may appoint a mediator to attempt to narrow the issues in dispute and effect a settlement. If no resolution is reached, the Commissioner will conduct a private inquiry and make an order disposing of the issues.

All decisions of the Information and Privacy Commissioner are final and no further route of appeal is provided in the Act. In rare cases, a judicial review proceeding may be brought before the Ontario Court General Division where the Commissioner has made an error in procedure, has acted on inadmissible evidence or has exceeded the statutory jurisdiction.

The Chair of Management Board of Cabinet is the minister responsible for the administration of the Act.

COVERAGE OF THE ACT

Introduction

Currently, the Act applies to "institutions" defined in section 2(1) as

> (a) a municipal corporation, including a metropolitan, district or regional municipality or the County of Oxford,
>
> (b) a school board, public utilities commission, hydro-electric commission, transit commission, suburban roads commission, public library board, board of health, police commission, conservation authority, district welfare administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the *Municipal Act*,
>
> (c) any agency, board, commission, corporation or other body designated as an institution in the regulations;
>
> In addition, every agency, board, commission, corporation or other body not mentioned in clause (b) of this definition or designated under clause (c) is deemed to be a part of the municipal corporation for the purposes of the Act if all of its members or officers are appointed or chosen by or under the authority of the council of the municipal corporation.

The Act does not establish any criteria for designating organizations as institutions in the regulations and, to date, none have been designated.

Extending Coverage

Public accountability and a compelling public interest in open government are at the root of all freedom of information schemes, without which these principles are not assured. Currently in Ontario, there are a number of public bodies such as public hospitals, universities, social service agencies including children's aid societies which, despite carrying out important public functions or receiving public funds, are not covered by either of the province's freedom of information statutes.

The issue of which public bodies should be subject to the legislation was first addressed by the Williams Commission. It recommended that freedom of information legislation should apply to "those public institutions normally perceived by the public to be a part of the institutional machinery of the Ontario government." According to the Commission, an institution is part of the machinery of the government if it is a public institution which is either wholly financed from the provincial consolidated revenue fund, or controlled by the government (whether through ownership or power of appointment). Recognizing that this definition would exclude some public organizations that receive extensive public financing such as hospitals and universities, the Commission argued that it was nonetheless an appropriate limit to the scope of the legislation because such institutions were not commonly thought of as institutions of government. Much the same reasoning applied to exclude self-regulating professions from coverage of the Act.

More recently, in evidence before the Committee, several witnesses recommended that the scope of the legislation should be extended to cover many of the very institutions excluded under the Williams Commission proposal. The Chair of Management Board of Cabinet, in his opening remarks to the Committee, indicated that the extension of coverage of the Act was an issue that has been raised with the Ministry by many citizen's groups. The Information and Privacy Commission recommended that the Act be extended to cover specifically, hospitals, universities, social services agencies and self-governing professional bodies on the basis that such bodies receive public funds and carry out public functions. The extension, it was suggested, would enhance public accountability and ensure that privacy protection is available for the personal information collected by these bodies. Others urged an even broader extension of coverage of the Act to include the Ombudsman, and the many self-governing bodies in the province including the regulatory Colleges under the *Regulated Health Professions Act*, the Law Society and other agencies, boards and commissions not currently covered by the legislation.

Several jurisdictions have extended freedom of information legislation to public hospitals, universities and self-governing professional bodies on the basis that the organizations are in receipt of public funds or are performing a public function. For example, the Saskatchewan and Quebec statutes focus on the receipt of public funding as the criterion for extending coverage. In British Columbia, the criteria is not only whether a body is receiving government funds but also whether it is performing a government function. In each of these jurisdictions the scope of coverage of the freedom of information legislation is considerably broader than either of the Ontario statutes.

Saskatchewan's legislation applies to "local authorities" which are defined as: municipalities, any board, commission, or other body that is appointed under municipal acts or that is prescribed; public libraries, boards of education, colleges and universities, hospitals, special-care homes, ambulance boards, or any board, commission or other body that is prescribed or that receives more that 50% of its annual budget from the Government or a government institution.

The Quebec legislation covers: municipal bodies, school bodies (including universities); health services and social service establishments "which operate with sums of money taken out of the consolidated revenue fund" (e.g., local community centres, hospitals, housing centres and temporary shelters).

The recently enacted British Columbia *Freedom of Information and Protection of Privacy Act* applies to the broad public sector including municipalities, school boards, hospital boards, police boards, universities, colleges and self-governing professional bodies.

In its 1991 *Report of the Standing Committee of the Legislative Assembly on the Freedom of Information and Protection of Privacy Act, 1987*, the Committee considered the scope of the Act. It concluded that coverage should be extended to provide greater access to more government information. The primary criterion used by the Committee to decide whether coverage should be extended to any

particular organization was whether the organization was receiving public funding. In particular, the Committee recommended that any organization receiving more than $50,000 in public funds should be subject to the Act. The rationale for this approach was that,

> The Committee believes that the public has a right to follow public money wherever it may flow, regardless of whether the recipient organizations receive all or only a portion of their funding from the government, and regardless of whether these organizations are commonly viewed as institutions of government. Institutions receiving significant public funds, such as hospitals and universities, should be accountable to the public for the use of those funds.

The Committee also recommended that coverage of the Act be extended to the administrative and support services of the Legislative Assembly and to all "government agencies," which should be defined in the legislation as "any agency to which the government appoints at least one member." Although the Committee received submissions regarding concerns about access to health care records, it made no recommendation on the issue because the Ministry of Health indicated that it was in the process of reviewing all health related information issues as part of a proposed *Health Care Information Access and Privacy Act*. Since the 1991 report, no further progress has been made in the enactment of such legislation.

In the Committee's view, public institutions such as the province's hospitals, universities and social service agencies have for too long been shielded from the public scrutiny that the province's freedom of information and protection of privacy statutes make possible and that public accountability demands. The extension of coverage to these institutions is the natural next step in the evolution of the province's freedom of information scheme.

Consultations with the proposed public organizations including hospitals, universities, social service agencies; the Information and Privacy Commissioner; Management Board Secretariat; affected ministries, groups, associations and

individuals should be undertaken as soon as possible to identify any unique access and privacy needs of these organizations that may present potential barriers to the extension of coverage. In addition, the cost implications to all concerned must also be examined to ensure that the most appropriate and cost effective methods are used to extend coverage of the province's freedom of information and protection of privacy legislation to all such organizations.

The Committee, therefore, recommends:

1. *that coverage of the province's freedom of information and protection of privacy statutes be extended to hospitals, universities, social service agencies and other public bodies that are receiving significant public funding or performing public functions but that are not currently covered by the legislation; and*

2. *that public consultations be undertaken with such public organizations including public hospitals, universities and children's aid societies to assist in the process of identifying possible barriers to extending coverage and to ensure the most appropriate, efficient and cost effective methods of implementing the foregoing recommendation.*

FREEDOM OF INFORMATION - PART I

Purposes of the Act

Public Accountability

Public accountability of government to the electorate it serves is one of the underlying rationales of all freedom of information schemes. It is also a prerequisite for the relationship between citizens and government in a democratic society.

Although section 1 sets out the purposes of the Act, the section does not specifically recognize public accountability as one of those purposes.

Increasingly, governments at all levels face the challenge of earning and maintaining the trust and respect of the public. The Committee believes that integrity in government is enhanced through public accountability and that freedom of information legislation is one of the best ways to ensure that governments are open to the electorate they serve. The Act should be amended to explicitly recognize public accountability as one of the legislative purposes.

The Committee, therefore, recommends:

3. *that section 1 of the Act be amended to include the following new provision:*

> *"to make public bodies more accountable to the public."*

Inconsistent wording

Section 1 refers to a right of access to records "held by" or "under the control" of institutions. Under section 4(1), the general right of access provision, the right of access is to records "in the custody or under the control" of an institution. This same wording is used in all of the other sections of the Act where reference is made to the records held by an institution.

There is no substantive reason why the wording in section 1 should be inconsistent with the rest of the Act. In the Committee's view, the wording of section 1 should be amended to accord with the rest of the Act to eliminate confusion and the possibility of misinterpretation.

The Committee, therefore, recommends:

4. *that section 1 of the Act be amended as follows:*

> *1. The purposes of this Act are,*

(a) to provide a right of access to information in the custody or under the control of institutions in accordance with the principles that, . . .

(iii) decisions on the disclosure of information should be reviewed independently of the institutions which have the custody or control of the information;

(b) to protect the privacy of individuals with respect to personal information about themselves in the custody or under the control of institutions and to provide individuals with a right of access to that information.

Records in the Custody or Under the Control of an Institution

Section 4 of the Act establishes the general right of access to records in the "custody or under the control" of an institution. Except for the purposes of the exemptions, the Act does not distinguish among the types of records that an institution holds. Instead, the legislative scheme is premised on whether the records are in the "custody or control" of an institution.

A concern raised by one municipality was that the personal notes and files of elected officials may be subject to disclosure under section 4 because of the failure of the Act to distinguish between "personal" records and records created for the purposes of carrying out the functions of the institution.

In particular, the Township of Mariposa reported to the Committee that it received a request under the Act for the personal notes of the township councillors. The notes consisted of marginal notations made as personal memory aids for matters to be discussed at a council meeting. These notations were made on documents that were otherwise available to the public. Because they were for personal use, there was no standard practice of making, keeping, filing or destroying the notes and, in many cases, they were not integrated into the institution's files. The municipality objected to producing the councillors' notes on the basis that they were created by

each councillor for his or her own personal use and were never intended to be made public.

The issue of whether the Act applies to the personal notes or files of an employee or official of an institution was considered by the Information and Privacy Commissioner in Order 120. The case involved a request for access to the "personal notes" of an employee made while she was a panelist on a job competition. The employee objected to the production of the notes claiming that they had been made for her own personal use, had been kept on a computer disc at home, and had not been integrated into the files of the institution. The issue, according to the Commissioner, was whether the records were in the "custody or control of the institution."

The employee's notes were ordered to be disclosed on the basis that, although the employee's original intention was to create the record as a personal note and memory aid for her exclusive use in planning future action, her subsequent use of the notes in an internal memo evidenced an intention to introduce the record into the employment context. The Commissioner was also influenced by the fact that the record was created to document employment related concerns identified by the panellist in her capacity as an employee.

The Commissioner cautioned that the findings of the case did not mean that the personal diaries of employees of institutions will qualify as "records" to which the Act applies. Only those records created for the purpose of documenting concerns directly related to the person's responsibilities within the institution and which are subsequently introduced into the institutional context are covered by the Act. Each case must be determined on its own facts.

In Order P-267, the Commissioner ordered the disclosure of political party records which had been maintained by an employee together with the institution's files, but which were unrelated to the functions of the institution and were not held by the employee in his capacity as employee. The records were found nonetheless to

be in the custody and control of the institution and therefore subject to the Act. A crucial factor in this determination was the evidence of physical possession and the degree of integration of the records into the files of the institution.

The Legislative Assembly is not subject to either of the freedom of information statutes and therefore, the personal notes and files of the members of the provincial Legislature are not subject to disclosure under the Act. (However, because the provincial Act does apply to ministries, the notes of Ministers and parliamentary assistants are subject to the legislation where those notes relate to ministry business and are integrated into the ministry files.) The Committee is concerned that a double standard is created in respect of the personal notes of the different levels of elected officials. MPPs are not covered by freedom of information legislation and their personal notes are not subject to disclosure; however, local government institutions are subject to the Act and their personal notes may be subject to disclosure if they are integrated into the institution's files.

The Committee believes that the personal files and notes of all elected officials should be protected from disclosure under the Act. Even the threat of public disclosure of personal notes and files will have a chilling effect on the creation and use of personal notes by elected officials which will hamper their ability to participate fully in debates and to otherwise perform their duties. The absence of any provision to specifically exempt the personal notes of elected officials from disclosure, and the broad interpretation given to the phrase "in the custody or under the control of the institution" leave open the possibility that the personal notes and files of elected officials are subject to public disclosure.

The Committee, therefore, recommends:

5. *that the Act be amended to specifically exempt from disclosure the personal notes and files of elected officials where those notes are used for their personal use and are not integrated into the institution's files.*

EXEMPTIONS

Draft by-laws etc.

Substance of Deliberations

Subsection 6(1)(b) exempts from disclosure a record that reveals the "substance of deliberations" of a meeting of a council, board, commission if a statute authorizes the holding of the meeting in the absence of the public.

It was suggested to the Committee that the meaning of the phrase "substance of deliberations" is unclear, leading to different possible interpretations which have not been clarified by Orders under the Act. The phrase may mean the content of the actual discussions or, it may refer to the records that form the basis of the discussion. This latter interpretation, it was suggested, should be preferred because it is more in keeping with the particular statute that authorized the closed meeting.

The Information and Privacy Commissioner has issued a number of orders on this issue. In Order M-241 access was refused to a record because it would have revealed the substance of the actual discussions conducted in the closed meeting. Orders M-98, M-206 and M-208 also support the view that information in a record which forms the basis of the discussion of a closed session is not, for that reason, protected from disclosure; it is only if the record contains information that would reveal the substance of the discussions that it will be exempt from disclosure.

The Committee believes that the term "substance of deliberations" is vague and ought to be clarified. In particular, it should be defined as including the records that form the basis of the closed-meeting discussions. This definition is more in keeping with the particular statute that authorizes the holding of the meeting in the absence of the public.

The Committee, therefore, recommends:

6. *that the term "substance of deliberations" in subsection 6(1)(b) be defined to include "all records that are submitted to a body for the purpose of the in camera session and which form the basis of the actual discussions."*

Time Limit for Exemption to Draft By-laws, Council Records

The section 6 exemption for draft by-laws and closed meeting council records is time-limited. Under subsection 6(2)(c) the exemption applies only for twenty years from the date the record was created.

Recognizing that the sensitivity of records diminishes over time, the Committee believes that the current period of the exemption is unnecessarily long and should be reduced to fifteen years. This amendment will further the principle of open government while protecting truly sensitive information. In the 1991 review, the Committee made the same recommendation to the roughly equivalent section of the provincial Act.

The Committee, therefore, recommends:

7. *that the 20 year exemption period in section 6(2)(c) be reduced to 15 years.*

Advice or recommendations

Advice or recommendations made to an institution by an officer, employee or consultant to the institution are exempt from disclosure under subsection 7(1) of the Act. Section 7(2) sets out specific types of information that fall outside of the exemption and which therefore, cannot be withheld from disclosure. Although the list includes "factual material" and specifies other types of reports which cannot be withheld, no reference is made to public opinion polls and economic forecasts.

The primary concern relating to the public disclosure of documents containing advice or recommendations, according to the Williams Commission, is that "the documents would be written with less candour." In addition, if public servants were not able to fully express critical views or put forward contentious proposals, this could "diminish the quality of policy-making and decision-making within the government." The exemption for advice and recommendations was not intended to cover factual material or the analysis of factual material that goes beyond mere reportage, such as documents relating to public opinion polls and economic forecasts. According to the William Commission, documents containing an assessment of options relating to a specific factual situation should not be included in the exemption, unless they offer specific advice or recommendations.

Access to public opinion polls became an issue under the federal *Access to Information Act* when a request was made for access to government commissioned opinion polls, results of focus or survey groups, and contracts relevant to the subject of national unity and constitutional reform following the failure of the Meech Lake Accord. The matter was finally determined by the Federal Court of Canada which ordered disclosure of the information; however, by the time the information was released, it was no longer relevant. The federal Information Commissioner subsequently noted in his Annual Report

> . . . it is passing bizarre that the public should be denied knowing what the public thinks when the public pays for collecting information about itself.

The Committee notes that both the British Columbia and Nova Scotia freedom of information statutes specifically exclude public opinion polls and economic forecasts from the exemption for advice and recommendations.

Arguably, public opinion polls and economic forecasts fall within the meaning of "factual material" in subsection 7(2). However, the Committee believes that clarification is needed to eliminate any uncertainty and to ensure the timely release of such information which is critical to its value to the public. In the Committee's

view, all public opinion research, including public opinion polls and focus group research, that is paid for with public funds should be available to the public.

The Committee also believes that the 20 year exemption period in section 7(3) after which a record containing advice or recommendations must be disclosed, is needlessly long and should be reduced to 15 years. The same change was recommended in the Committee's 1991 Report with respect to the corresponding section in the provincial Act.

The Committee, therefore, recommends:

8. *that section 7(2) of the Act be amended by adding "public opinion research" and "economic forecasts" to the list of types of information that are not included in the exemption under section 7(1); and*

9. *that the 20 year exemption period in section 7(3) be changed to 15 years.*

Law enforcement

Investigations

Section 8(1) establishes a law enforcement exemption which protects records, the disclosure of which could reasonably be expected to interfere with a law enforcement matter or with a law enforcement investigation. However, before the exemption will apply, the request for access to the record must be processed within the 30 day time period set out in section 19 of the Act.

Witnesses involved in law enforcement informed the Committee that the very processing of the request may seriously disrupt or possibly impede an active investigation. The problem, it is suggested, is that the process of locating records which are being used "in the field," possibly by several different investigators; retrieving, indexing and copying the records; having investigators divert their attention from the investigation to review the records to assess whether any

exemptions apply and what parts can be severed is time consuming and disruptive to the investigation. In the past, requesters of active investigation records have been persuaded informally by law enforcement agencies to defer the request until completion of the investigation. This approach does not provide any certainty for the institution, however. It is proposed that the Act be amended to include a procedure to allow the head of a law enforcement agency to apply to the Commissioner for an exemption from having to process the request during the course of an active investigation.

Section 20 permits the extension of the 30 day period for a further period that is reasonable in the circumstances if:

> 20(1)(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
>
> (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

Arguably, the concern of the law enforcement agencies could be met under subsection 20(1)(a) although, the section focuses more on the difficulty of processing a large volume of records within the time period as opposed to the disruption caused to operations. It is also unclear whether the term "operations of the institution" would include one of any possible number of investigations being conducted by the institution.

Although the Commissioner has not made an order directly on point, Order P-517 suggests that the time limit under Section 20 will be extended for a definite period where the request involves a large number of records which must be carefully reviewed by the individuals who are most familiar with them, and pressing operational requirements in the institution necessitates that these individuals attend to other duties for a large portion of their time.

The potential for disruption of an active police investigation by untimely access requests is a matter of great concern to the Committee. However, in view of the limited amount of evidence on the issue, the testimony that this type of interference is an exceptional occurrence, and the fact that section 20 has been interpreted by the Commissioner as offering some protection against such interference, the Committee is reluctant at this time to create additional barriers to access. The issue is nonetheless a matter of concern which must continue to be monitored. If these types of requests are becoming a more frequent disruption, the Committee would reconsider ways of addressing the problem, including allowing the Commissioner to temporarily exempt a law enforcement agency from responding to the request until it can be done without disruption to the investigation.

Routine Inspection Reports

Section 8(2) of the Act exempts from disclosure certain types of law enforcement records. In particular, clause 8(2)(a) provides that the head may refuse to disclose a record

> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

Section 8(4) provides an exception as follows:

> 8(4) Despite clause 2(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency that is authorized to enforce and regulate compliance with a particular statute of Ontario.

This provision reflects the view that it is inappropriate to withhold from public scrutiny all material relating to routine inspections. Thus reports under health and safety legislation, consumer protection regulation and environmental protection schemes are accessible under the Act.

The wording of section 8(4) may, however, suggest that other exemptions will apply to prevent the disclosure of routine inspection reports. The Committee believes that the section should be amended to clarify that other exemptions under the Act do not apply to routine inspection reports.

The Committee, therefore, recommends:

10. that section 8(4) of the Act be amended as follows:

> *(4) Despite any exemption, a head shall disclose a record that is a report prepared in the course of routine inspection by an agency that is authorized to enforce and regulate compliance with a particular statute of Ontario.*

Relations with Governments

Extension of Exemption

Section 9 exempts records, the disclosure of which could reasonably be expected to reveal information received from another government in confidence. Currently this exemption applies only to confidential communications from the federal, provincial, territorial or foreign country or state governments or their agencies. It does not cover communications from municipal governments. It was suggested that the omission of municipal governments from this provision is an unnecessary distinction between levels of governments.

The rationale for the exemption, according to the Williams Commission, was "to exempt sensitive information that may be generated by international relations or the relations of the province of Ontario with the governments of other jurisdictions." This rationale does not apply in respect of communications at the municipal level. In addition, an extension of the exemption to include communications from a municipality would raise the argument that communications from, for example, local boards or commissions should be

granted the same exemption. This would greatly expand the number of records that could be withheld from the public.

Very little evidence was presented as to why the exemption should be extended to cover municipalities or the harm that has been caused by the omission. The Committee is, therefore, unable to support the suggestion that such an extension is needed.

Time Limit For Exemption For Relations With Governments

There is no time limit on the section 9 exemption. The result is that access to intergovernmental records will be precluded in perpetuity, despite the fact that the sensitivity of records is lost over time.

In its 1991 report, the Committee supported the establishment of time limits on a similar provision under the provincial act as a measure of further defining and narrowing the exemptions.

The Committee also notes that other jurisdictions such as British Columbia and Nova Scotia have imposed time limits of fifteen years on this exemption.

The Committee, therefore, recommends:

11. that section 9 of the Act be amended to provide for a time limit of 15 years after which records must be disclosed.

Third-Party Information

Section 10 is a mandatory exemption for records that reveal a trade secret or scientific, technical, commercial, financial, or labour relations information supplied in confidence, if the disclosure could reasonably be expected to prejudice certain interests of the third party. Section 10(2) provides:

> (2) a head may disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure.

In the Committee's view, there is no reason why the institution should retain the discretion to refuse to disclose the record where the third party, the person for whom the exemption was intended, consents to its disclosure.

The Committee, therefore, recommends:

12. that section 10(2) of the Act be amended to state:

> *A head shall disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure.*

Solicitor-Client Privilege

Municipal Police Forces

Section 12 of the Act provides a solicitor-client privilege exemption as follows:

> 12. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

This provision has two branches: branch 1 is a codification of the common law doctrine of solicitor-client privilege and will apply only in the context of a solicitor-client relationship; branch 2 will apply regardless of whether the common-law privilege applies but requires that the record be prepared by or for counsel "employed or retained by an institution." The section has been interpreted as not applying to confidential communications including the crown brief, prepared by municipal police forces for Crown counsel. In order M-52, the Information and Privacy Commissioner ruled that the relation between local police forces and a Crown Attorney is not that of solicitor-client so that the common law

privilege (branch 1) cannot apply. Moreover, the Crown Attorney, who is an employee of the provincial government, is not "employed or retained" by the local police forces so that branch 2 of the exemption similarly does not apply.

The wording of the equivalent exemption in the provincial Act is slightly different. FIPPA section 19 provides

> 19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of litigation.

Because of the specific reference to "Crown counsel" in section 19, communications between the Ontario Provincial Police, to which the provincial Act applies, and Crown counsel are protected. Section 12 of the municipal Act does not refer to "Crown counsel." Instead it refers to "counsel employed or retained" by the institution. Thus the 120 or more local police forces do not have protected communications with Crown counsel.

In the Committee's view, there is no basis for this difference in treatment. The exemption should be available equally to all police forces.

In its 1991 review of FIPPA the Committee considered section 19, the equivalent to MFIPPA, section 12. The Committee noted that there was uncertainty as to whether the term "Crown counsel" includes any legal advisor retained by the institution, or only to an employee of an institution holding the specific position of "Crown counsel."

To clarify any ambiguity the Committee recommended that section 19 be amended to reflect the wording in the municipal Act, that is, that the exemption applies in respect of counsel "employed by or retained by an institution."

In light of the concerns expressed by municipal police forces about the deficiency of the wording in the municipal Act, the Committee recommends that section 12 be amended to exempt confidential communications between municipal police forces and "Crown counsel." Section 19 in the provincial Act should be amended to reflect this recommended change to section 12 of the municipal Act.

The Committee, therefore, recommends:

13. *that section 12 of the Act be amended to extend the exemption to cover the confidential communications between municipal police forces and Crown counsel; and*

14. *that the Committee's recommendation #16 in the 1991 Report be amended to reflect this proposed change to section 12 of the municipal Act.*

Records Prepared by Non-Legal Staff

A second issue concerning section 12, is a suggestion that the Commissioner's interpretations have narrowed the scope of the provision so that records prepared by non-legal staff, even though prepared for or in the contemplation of litigation, are not covered by the exemption.

The exemption in section 12 goes beyond the common-law doctrine of solicitor-client privilege. Branch 2 of the exception also protects records prepared by or for counsel for use in giving legal advice or in contemplation of or for use in litigation. In Order M-173 the Commissioner ruled that the exemption applied to memoranda prepared by non-legal staff of the institution for counsel in contemplation of litigation. The institution's solicitor had requested that staff prepare notes in respect of a matter that the solicitor expected would result in a grievance arbitration.

In the Committee's view, therefore, it does not appear that the exemption has been interpreted so narrowly as to exclude any material or communications prepared by

non-legal staff for counsel. Moreover, in view of the very limited evidence presented on this issue, the Committee makes no recommendation for amendment.

Danger to Public Safety

Section 13 allows a head to refuse to disclose a record if disclosure could reasonably be expected to seriously threaten the safety or health of an individual. However, there is no authority for the head to refuse to confirm or deny the existence of such a record, and the head must identify the particular section as the basis for refusal. The requester therefore is alerted to the fact that the record exists and that it cannot be released because it could reasonably be expected to seriously threaten the safety or health of an individual.

A similar harm is dealt with differently under the section 8 law enforcement exemption. This section allows the head to refuse to disclose a record if the disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Where this exemption applies, the head also has the authority to confirm or deny the existence of the record.

The concern is that having to acknowledge the existence of a record and cite the section 13 exemption as the basis for refusal, could incite a response which itself might reasonably be expected to threaten or endanger the health or safety of a person. For this reason, the Committee believes that a provision should be added giving the head the authority, similar to section 8(3), to confirm or deny the existence of the record.

The Committee, therefore, recommends:

15. that section 13 be amended by adding a subsection 13(2) as follows:

> *(2) a head may refuse to confirm or deny the existence of a record to which subsection (1) applies.*

Personal Privacy

Introduction

Section 14(1) of the Act provides that a head of an institution shall refuse to disclose "personal information" to any person other than the person to whom the information relates, except in the circumstances listed in subsections 14(1)(a) through (f).

Under subsection 14(1)(f) personal information can be disclosed if the disclosure would "not constitute an unjustified invasion of personal privacy." The criteria for determining whether the disclosure constitutes an unjustified invasion of personal privacy are set out in section 14(2). Under section 14(3) there are eight categories of personal information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) sets out the categories of information, the disclosure of which will not constitute an invasion of personal privacy, despite the presumption in section 14(3).

Finally, section 14(5) permits the head of an institution to refuse to confirm or deny the existence of a record if disclosure of the existence or non-existence of the record would constitute an unjustified invasion of personal privacy.

It should be noted that the section 14 exemption relates to the disclosure of personal information when a request is made for such information by someone other than the person to whom the information relates. This situation must be distinguished from a request for access to one's own personal information which is governed by the provisions of section 36 and 38 or the provision governing the disclosure of personal information by an institution in the ordinary course of its business.

Complex Drafting

Section 14 has been criticized as being overly complex, awkwardly drafted and difficult to apply. It was suggested, for example, that the circumstances set out in subsection 14(1)(a) through (e) logically should be combined with the criteria set out in section 14(4). The double negative wording in subsection 14(1)(f) was cited as being particularly difficult to understand.

In the 1991 review, the Committee heard the same criticism in respect of section 21, the provincial Act equivalent to section 14. The Committee recommended that consideration be given to re-drafting the entire section and in particular, to re-drafting the test for disclosure set out in subsection 21(1)(f), to make the section less convoluted and more easily understood by users.

The Information and Privacy Commissioner has proposed that section 14 should be restructured using the equivalent section in British Columbia *Freedom of Information and Protection of Privacy Act*, 1992 as a model to make the section easier to understand and apply. Section 14(1) would state simply that the head of an institution must refuse to disclose personal information to any person except the person to whom the information relates "if the disclosure would constitute an unjustified invasion of personal privacy," and section 14(4) would be revised to include the five circumstances set out in the current sections 14(1)(a) through (e). The Committee believes that the section would be simplified and made more comprehensible by this amendment.

The Committee, therefore, recommends:

16. *that section 14 of the Act be restructured to make it easier to understand and apply. In particular, section 14 should state simply that the head of an institution must refuse to disclose personal information to any person except to the person to whom the information relates "if the disclosure would constitute an unjustified invasion of personal privacy." In addition, section 14 (4) should be revised to include the five circumstances set out in the current sections 14(1)(a) through (e).*

Categories of Presumed Invasion of Personal Privacy

Under section 14(1) a head cannot disclose personal information to a third party if the disclosure would be an unjustified invasion of personal privacy. Section 14(2) lists the criteria to be used in determining if the disclosure constitutes an unjustified invasion of personal privacy and section 14(3) contains eight categories of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

Until recently, the Information and Privacy Commissioner had interpreted section 14 as giving the Commissioner the authority to balance the criteria in section 14(2) against section 14(3) to rebut the presumption created by section 14(3).

However, in a recent judicial review of Order P-541 (involving the interpretation of section 21, the equivalent to MFIPPA section 14), the court ruled that this interpretation of the Act misconstrued the relationship between section 14(2) and 14(3). Section 14(2) could not be used to rebut the presumption of an unjustified invasion of privacy under section 14(3). Instead, once a presumption of unjustified invasion of privacy has been established under section 14(3) it can only be rebutted if the information falls within the limited categories of personal information set out in section 14(4) or if the more general "public interest override" section applies.

It was suggested that this change in interpretation injects rigidity into the Act and undermines the balancing of interests that is a foundation of the legislation. It also fixes the number of categories of information that are presumed to constitute an unjustified invasion of personal privacy. It was proposed by the Information and Privacy Commissioner that section 14 be amended to reduce the number of categories of personal information under section 14(3), the disclosure of which are presumed to be an unjustified invasion of personal privacy, and to permit cases to

be determined on an individual basis, balancing the criteria in section 14(2) with section 14(3) to rebut the presumption where applicable.

The Committee cautiously supports the proposed amendment. The change will make the Act less rigid and will permit a balancing of the public interest in access to government-held information and the protection of personal privacy. The Committee's hesitation lies in the fact that little evidence was presented concerning the problems that have arisen as the result of the court's more restrictive interpretation of section 14 or of the effect of the proposed change on the protection of privacy. In the Committee's view, the amendment must be carefully drafted so as to be responsive to identified problems. It should not be an overly broad amendment which may have the unwanted effect of diminishing the protection of personal privacy which section 14(3) is designed to ensure.

Any amendment to section 14 should also take into consideration the impact of recent legislation including the *Substitute Decisions Act*, the *Consent to Treatment Act*, the *Advocacy Act* and the *Consent and Capacity Statute Law Amendment Act* to ensure that it is in compliance with these statutes.

The Committee, therefore, recommends:

17. *that section 14 be amended to reduce the number of categories of personal information, the disclosure of which is presumed to be an unjustified invasion of personal privacy by permitting the balancing of criteria set out in section 14(2) with section 14(3) to rebut the presumption in section 14(3). Such amendment should be drafted carefully to safeguard the privacy interests protected by the Act and with a view to addressing specific identified problems rather than be a blanket rebuttal of the section 14(3) presumption; and*

18. *that any amendment to section 14 take into account recent legislative schemes designed to make it possible in certain circumstances for a person to have access to personal information about another individual to make personal care, property and medical decisions for that individual.*

Mailing Lists

There is no specific provision in the Act dealing with access to personal information which could be used for mailing lists or other forms of solicitation.

Significant privacy concerns were identified by the Commissioner in the disclosure of an individual's name, address and telephone number for the purpose of a mailing list or other solicitation, without the consent of the individual. The concern focuses on the interest that every individual has in controlling information about themselves that is being held by others. The Canadian Task Force on Privacy and Computers in its 1992 report, *Privacy and Computers*, defined the privacy interest in such information as follows:

> This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit . . . . Competing social values may require that an individual disclosure certain information to particular authorities under certain circumstances (e.g., census information). He may decide to make it available in order to obtain certain benefits. He may also share it quite willingly with his intimates. Nevertheless, he has a basic and continuing interest in what happens to his information, and in controlling access to it.

This same concern was addressed by the Committee in its 1991 Report. The Committee supported the recommendation of the Commissioner to include a provision to protect from disclosure, personal information including an individual's name, address and telephone number, when the request is made for mailing list or solicitation purposes. However, the Committee was concerned about two difficulties with this proposal: first, the Act does not require a requester of information to state the purpose of the request and therefore it will not always be possible for an institution to know whether a request is being made for mailing list or solicitation purposes; and second, there is no definition of "mailing list purposes" and therefore, it was not clear to the Committee whether a

request for a list of names and addresses for a non-commercial purpose such as the organizing of a union, would constitute a "mailing list purpose."

The Committee is aware that since its 1991 Report, other jurisdictions, such as British Columbia have enacted provisions that create a presumption of unjustified invasion of personal privacy based on the purposes for which the information is to be used. Section 22(3) of the *Freedom of Information and Protection of Privacy Act, 1992*, provides:

> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if,
>
> > (i) the personal information consists of the third party's name together with his or her address or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

The British Columbia legislation does not contain a provision specifically authorizing the institution to inquire into the purpose of the request before responding to it. Nor does the Act have an enforcement mechanism to deal with the misrepresentation of the purpose of a request. However, the Policy and Procedures Manual of the legislation provides that:

> In order to determine whether or not this section applies, the public body can ask if the applicant intends to use the requested information for mailing lists or solicitation purposes.

Nova Scotia's *Freedom of Information and Protection of Privacy Act*, contains a similar provision.

The Committee believes that an individual's privacy interest is not adequately protected where the person's name, addresses, and telephone number can be made available for mailing lists. The Committee also objects to the use of public funds to finance access to information for private commercial purposes such as mailing list solicitation. However, the Committee is concerned about the enforcement of a

provision which restricts access based on the purposes of the request or the use to which the information will be put.

The Committee, therefore, recommends:

19. that section 14(3)of the Act be amended to provide that

> *14(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,*
>
> *(i) consists of an individual's name, address or telephone number and is to be used for mailing lists or solicitation by telephone or other means.*
>
> *and that further consideration be given as to how the provision can be enforced effectively.*

Salaries of Public Officials and Employees

The disclosure of an individual's actual income is presumed to be an unjustified invasion of personal privacy under section 14(3)(f). However, the disclosure of an individual's "salary range," does not constitute an unjustified invasion of personal privacy and is permissable under the Act.

Many witnesses criticized the Act because it protects from disclosure the actual salaries and benefits that are paid out of the public purse to public officials and employees. These criticisms raise important issues about public accountability.

In the Committee's view it is significant that in October 1993 the Minister of Finance announced a new policy requiring private sector companies that are publicly traded in Ontario to disclose the compensation paid to their top five executives. Previously, such companies had to disclose only an aggregate total for all executives. The government's rationale for this change was to give "shareholders the information they need in order to compare a company's performance with the way it rewards its top people."

In opening remarks before the Committee, the Chair of Management Board of Cabinet, indicated the government's intention to pursue the issue of requiring disclosure, at some level, of salaries for the provincial and broader public sectors.

Until the coming into force of the provincial *Freedom of Information and Protection of Privacy Act* on January 1, 1988, the actual salaries of public officials and of public service employees who earned in excess of $50,000 per year were published annually. The publication of public service employees' salaries above a threshold level had been the practice in the province since the early 1950s. Prior to this time, the actual salaries of all public servants were publicly disclosed.

The Committee recognizes that there is compelling public interest in the disclosure of the actual salaries and benefits of public employees and officials. There are also important privacy issues to be considered. As with all other facets of the Act, there is a need to balance these interests.

In the Committee's view, public interest in ensuring the prudent expenditure of public funds and in the accountability of those who are being paid out of the public purse, justifies the requirement of routine disclosure of the actual compensation paid to elected officials. In the case of public service employees, the Committee believes that the privacy interests of employees must be balanced against the public interest in disclosure. While the principle of public accountability is compelling at the higher levels of political and operational responsibility, it is less so at the lower salary ranges where there is no overall policy or administrative responsibility. For this reason, the Committee believes that a threshold of $50,000 per annum in salary and benefits should be established for the disclosure of public service employees' compensation. This threshold level would appropriately balance the public interest in accountability based on operational and administrative responsibility with the employees' legitimate privacy interests.

Based on these same principles, the Committee believes that the financial details of personal service contracts with institutions should also be subject to routine publication. Because the terms of such contracts vary significantly and are generally for periods of less than one year, further consideration should be given as to how often and in what format institutions should be required to routinely publish the financial details of these contracts.

The Committee, therefore, recommends:

20. *that the Act be amended to require institutions to routinely publish, at least annually, the actual compensation paid to elected officials and the actual compensation paid to public service employees earning in excess of $50,000 per annum in salary and benefits; and*

21. *that institutions also be required to routinely publish the financial details of personal service contracts and that further consideration be given as to how often and in what format the routine publication should be made.*

Severance/Termination/Early Retirement Benefits

The arguments made in support of the public disclosure of the salaries of elected officials and employees of public institutions apply equally to the issue of the disclosure of the financial terms of severance, termination and early retirement benefits paid by institutions under negotiated agreements. The public interest in knowing how tax dollars are being spent and whether the public is getting value for the money also applies to the benefits paid to retiring or terminated employees.

The problem is that these agreements can be sheltered from disclosure by the section 6 exemption which exempts records that "reveal the substance of deliberations" of meetings held in the absence of the public. In Order M-196, the Commissioner found that the institution met the criteria necessary to rely on section 6(1)(b) and ruled that the exemption applied to protect the financial terms of a retirement agreement between an employee and the institution from

disclosure. The public interest override in section 16 did not apply because section 6 is one of the exemptions to which section 16 does not apply.

In a postscript to this Order, Assistant Commissioner Glasberg, stated that retirement agreements warrant a high degree of public scrutiny for three reasons. First, the agreements involve large sums of public funds. Second, the agreements involve senior municipal employees with a high profile in the community. Third, the current recessionary climate places an unparalleled obligation on officials at all levels of government to ensure that tax dollars are spent wisely. For these reasons, the Commissioner expressed concern about the use of the section 6 exemption to shield early retirement agreements:

> Where early retirement agreements have been considered in meetings which are closed to the public, municipalities may, under certain circumstances, be permitted to rely on section 6(1)(b) of the Act to withhold access to information contained in these records. It would be unfortunate, however if institutions began to use this provision to routinely shield the financial terms of such agreements from legitimate public scrutiny.

In other appeals, where the section 6 exemption was not at issue, the Commissioner has ruled that release of the financial terms of retirement and severance agreements does not constitute an unjustified invasion of personal privacy.

The Committee is concerned that the financial arrangements of these agreements can be shielded from public disclosure under the section 6 exemption, despite the justifiably high degree of public interest in such arrangements. In the Committee's view, retirement/severance and termination benefits and agreements for public service employees should be treated in the same way as public service employees' salaries, that is, they should be routinely available to the public. At the same time, the Committee recognizes that there are cases involving sensitive negotiations for severance or early retirement where one of the most important provisions of the agreement is that neither party will disclose the terms of the

agreement. This issue was identified but not thoroughly examined by the Committee. Thus further investigation of the effect of routine disclosure of the financial terms of such contracts should be undertaken with a view to addressing these effects.

The Committee, therefore, recommends:

22. *that the Act be amended to ensure that the section 6 exemption cannot be used to shelter the financial terms of retirement, severance and termination benefits paid by institutions; and*

23. *that the effects of this amendment on the negotiation and terms of severance and retirement agreements be further investigated and addressed in ways that do not impair the routine disclosure of the financial terms of such agreements.*

Information Soon to be Released

Location of the Information

Section 15 of the Act permits a head to refuse to disclose information that has been published, is currently available to the public or that will be published within 90 days of the date of the request.

Section 15, however, does not require the head, when relying on this section, to inform the requester of the location of the information. Without this obligation, it was suggested, a *de facto* denial of access may result because of the difficulties the requester may experience in trying to locate the information.

In Order 123, former Commissioner Linden interpreted the equivalent section in the provincial Act as requiring, by necessary implication, the head to inform the requester of the specific location of the record or information requested.

In its 1991 review, with respect to the equivalent section in the provincial Act, the Committee recommended that this implicit obligation be made explicit on the basis

that the change would enhance public accessibility and would not seriously inconvenience institutions. The record in question would be one that is in the custody or control of the institution, and the institution would be in the best position to advise the requester as to where the record could be found.

The Committee adopts the same reasoning with respect to section 15 of the Act and recommends that the obligation to inform the requester of the location of the record be made explicit.

The Committee, therefore, recommends:

24. that section 15 of the Act be amended as follows:

> *15. A head may refuse to disclose a record if,*
>
> *(a) the record or the information contained in the record has been published or is currently available to the public, and the head has informed the requester of the specific location of the record or the information contained in the record.*

Notification of Requesters

Section 15(b) is silent on what course of action is to be taken in the situation where the head has in good faith relied on section 15(b) and then due to a change in circumstances, the information is not published within 90 days or as scheduled. The section is unclear as to whether the requester must make another access request for the same record or whether the institution can continue to claim the exemption even if the time for publication has passed and the information has not become available in published form.

The Commissioner's Office has recommended that a new provision be added which would require the head of an institution relying on subsection 15(b) to give a requester written notice, in accordance with section 19, of the fact that the record will not be published as scheduled. The proposal would not require the

requester to make another request for the same record, but would give the head the requisite 30 days within which to advise the requester whether, in light of the changed circumstances regarding publication, a record will be released.

Virtually the same recommendation was adopted by the Committee in its 1991 review with respect to the equivalent of the provincial Act. In the Committee's view, the same concerns apply to section 15 of the Act and the same recommendation should be made.

The Committee, therefore, recommends:

25. *that section 15 be amended to prevent an institution from relying on section 15(b) more than once in respect of a record; and that the following section be added:*

15(2) Where a head refuses to disclose a record or the information contained in the record under clause (b) and subsequently learns that the record will not be published as scheduled, the head shall immediately give the person who made the request, written notice in accordance with section 19.

Draft Documents

It was suggested to the Committee that the draft versions of documents or records that have been published or that will be published within the time frame set out in section 15(b) should also be exempt from disclosure. The rationale is that such documents are routinely developed through a series of drafts. These preliminary versions of the final document may contain factual errors which are subject to correction at a later stage, and they may also reflect the undeveloped preliminary thoughts of the individuals who prepare them. It was noted in support of this position that section 6 of the Act already protects from disclosure the draft of a by-law or a private bill.

The existing scheme of the Act does not distinguish among the different types of documents that an institution may hold or the purposes for which they were

created. Instead, access is based on whether the record is in the custody or under control of the institution. Unless the record falls within one of the statutory exemptions, it is subject to disclosure.

The section 6 exemption for draft by-laws and private bills is based on the rationale for the exemption of Cabinet documents in the provincial Act. It is not intended to protect draft documents *per se* but, in the words of the Williams Commission, "to protect the deliberations and decision-making processes" of the Cabinet. Although re-framed to accommodate the structures of local governments, section 6 is similarly based on this rationale. Draft documents, other than draft by-laws or private bills, do not fall into this category.

In the Committee's view, the proposed amendment would require the creation of a new exemption and would make unavailable records that are currently accessible under the Act. The Committee, therefore, believes that the existing provision does not require an amendment.

Compelling Public Interest

Section 16 is a general override provision. It provides:

> 16. An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 16 has been criticized because the test it sets is too onerous and it therefore fails to accord sufficient weight to the public interest. To date, section 16 has never been successfully applied in an Order.

Another deficiency that was pointed out is that the override provision does not apply to all of the exemptions under the Act. Exemptions under sections 6 (draft

by-laws, etc.), 8 (law enforcement), 12 (solicitor-client) and 38 (personal information exemption) cannot be overridden by a compelling public interest.

The Information and Privacy Commissioner proposes that the test for application of the override provision should be "when the disclosure is clearly in the public interest." This would be a more attainable test and it reflects the test being used in other jurisdictions, notably British Columbia and Quebec. In addition, in order to increase public access, particularly where there is a compelling public interest, all of the exemptions in the Act should be made subject to the public interest override.

In the 1991 review, concerns about the unworkability of section 23, the provincial Act equivalent to section 16, were also raised. At that time the Committee recommended that the section be reviewed with a view to clarifying the operation of the section and defining the term "compelling public interest."

The unworkability of the public interest override provision continues to be a matter of concern. The Committee reiterates its belief that the operation of the provision should be re-examined and that the critical term "compelling public interest" must be defined to make the provision understandable. While unable to recommend the degree to which the test should be amended to make it more attainable, the Committee is concerned about the suggestion that the override be made to apply to all of the existing exemptions. In particular, the proposal that the override provision should apply to the exemptions for law enforcement and solicitor/client privilege, in the Committee's view, would seriously interfere with and undermine the administration of justice. All of the exemptions are part of the fundamental balancing of interests under the Act and as such provide needed protection to those interests. A full investigation of the likely effects of extending the application of the override provision to these exemptions should be undertaken before any such amendment is considered.

The Committee, therefore, recommends:

26. *that the workability of section 16 be re-examined with a view to clarifying the operation of the section and by defining the term "compelling public interest;" and*

27. *that a thorough examination of the implications of extending the application of the public interest override provision to the three exemptions that currently are not subject to the override be undertaken before any such amendment is considered.*

ACCESS PROCEDURE

Consistent Reference to Requesters

Section 17(1) of the Act sets out the procedure for making a request for access. The person making the request is referred to as the "person seeking access." Subsection 17(2) governs the procedure where the requester fails to sufficiently describe the record and requires the institution to inform the "applicant" of the defect. Although these two sections refer to the same person, that is, the person making the request, different terminology is used to denote this person. This inconsistency serves no purpose and creates confusion.

The Committee, therefore, recommends:

28. *that subsection 17(2) be amended as follows:*

> *17(2) If the request does not sufficiently describe the record sought, the institution shall inform the person seeking access of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).*

Transfer of Requests

Section 18 governs the transfer of a request from one institution to another. Section 18(2) provides that where an institution receives a request for access to a record that the institution does not have in its custody or control, the head is required to make reasonable inquiries to determine whether another institution has

the record and, if so, to forward the request within 15 days to that other institution. The head is also required to notify the requester of the fact that the request has been forwarded.

Under section 18(3), where the head of the institution considers that another institution has a greater interest in the records (i.e., the record was originally produced in or for the other institution, or the other institution was the first to receive the record or a copy of it) the head may transfer the request to the other institution within 15 days and shall give written notice of the transfer to the requester.

Two issues were raised in respect of section 18. First, that in the case of a transfer to an institution with a greater interest under section 18(3), the head is not required to transfer the request. Instead, the transfer is left to the discretion of the head of the originating institution. This has resulted in undue delay and complications in processing appeals. Conversely, where a record is found not to be in the in the custody or control of an institution, the head is required under section 18(2) to make reasonable inquiries as to its whereabouts and forward the request to the institution that has control of the record. The head has no discretion under section 18(2). There is no apparent reason for the distinction between sections 18(2) and 18(3).

The second issue concerns the timing of the notification to the requester of the transfer. Both sections 18(2) and 18(3) provide for notification after the transfer has been made. One institution reported to the Committee that it has had requests where the requester did not want any other institution to know about the request and did not want the originating institution to make a referral or transfer the request to any other institution. A related concern was that if the requester was to be given the opportunity to consent to or refuse a transfer then the time period specified in the Act should be suspended pending the requester's decision.

The Committee believes that these concerns can be met through the implementation of the following proposals.

The Committee, therefore, recommends:

29. *that section 18(3) be amended by substituting the word "may" in line 4 with the word "shall," thereby imposing a positive obligation on the head to transfer the request; and*

30. *that sections 18(2) and 18(3) be amended to require that prior written consent of the requester to transfer or forward the request to another institution and that the time period specified in the section be suspended pending receipt of the consent or the passage of a specified reasonable time period.*

Contents of Notice of Refusal to Give Access

Where access to a record is denied, the head of the institution is required under section 19 to give notice to the requester of the refusal to disclose. Section 22(1)(b) governs the contents of the notice of refusal. Similarly, where access to information affecting a third party's interests or to personal information is denied, subsection 21(7) requires the head to give notice to the requester of the refusal. Section 22(3) sets out the contents of the notice of refusal. Sections 22(1)(b) and 22(3) do not specifically require the notice of refusal to include a description of the record relating to the request. The Commissioner is concerned that this omission places the requester and affected parties in the difficult position of having to decide whether or not to appeal the head's decision without having any knowledge of the nature of the record.

This same issue was addressed by the Committee in its 1991 review. It was noted at that time that the notice requirements under sections 29(1)(b) and 29(3) (the equivalent to sections 22(1)(b) and 22(3)), implicitly required a general description of the record and that this was recognized in Order 81 by former Commissioner Linden. The Committee believes that the decision of the Commissioner that there

is an implicit obligation to describe the record in the notice of refusal should also be incorporated into the municipal Act.

The Committee, therefore, recommends:

31. *that sections 22(1)(b) and 22(3) be amended to read*

22(1) Notice of refusal to give access to a record or part under section 19 shall set out,

(b) where there is such a record,

(i) a description of the record,

. . . .

22(3) A head who refuses to disclose a record or part under subsection 21(7) shall state in the notice given under subsection 21(7),

(a) a description of the record or part thereof;

. . . .

Access Request Time Limits

Although Part I of the Act establishes time limits for institutions to respond to requests, there are no incentives for institutions to adhere to these statutory time limits. Failure to respond within the time periods established in sections 19, 20 and 21(7) results only in a deemed refusal by the institution under subsection 22(4).

If the deemed refusal is appealed, the institution is still entitled to receive notice of the appeal and to make representations to the Commissioner. Thus, there are no consequences for an institution which fails to adhere to the time requirements under the Act.

When this issue was raised in the 1991 review of FIPPA, the Committee concluded "that the lack of any incentive for an institution to comply with time limits is a serious deficiency in the Act. The lack of incentives has created delays and discouraged use of the Act."

Since then, the Committee has heard from a number of institutions that staffing constraints, particularly in these times of limited financial resources, sometimes makes compliance with the statutory time limits very difficult. Smaller institutions, in particular, faced with large or multiple requests may be unable to divert sufficient staff time from other operational functions to meet the deadlines. It was argued that the imposition of a penalty as an incentive for compliance with time limits will only add to an institution's workload by requiring the institution to prove that the delay was not due to bad faith.

A related concern was that the reasons for extension of the 30 day period under section 20(1) are too restrictive and should be expanded to include time for researching the application of the Act to the record requested. Delay, it was suggested, often results from the increasing complexity of the statutory interpretations given to the Act and the need to research the appropriate application of the Act and to consult the Commissioner's Orders. In this regard, the Committee notes that statistics compiled by the Information and Privacy Commissioner and published in the 1992 *Annual Report* indicate that municipal government organizations responded to a substantial majority of requests — 91 percent — within 30 days. Less than two percent of requests took more than 120 days to complete. A similar majority of requests were answered within 30 days in 1991.

In the Committee's view, the complete failure of an institution to respond to a request undermines the purposes of the Act and creates unnecessary delay and additional expense for the public, the Commissioner's Office and the institution. To give substance to the time limits, the Act should include some procedure to encourage those institutions that might be inclined to ignore a request.

The Committee, therefore, recommends:

32. *that the following subsection be added to section 22:*

> *22(5) Where a head fails to give notice required under section 19 or subsection 21(7) concerning a record, the Commissioner may, on appeal, require the head to waive payment of all or any part of an amount required to be paid by the person who made the request for access to the record.*

Alternate Formatting

Access for Persons with Low Vision

It was brought to the Committee's attention that the Act makes no provision for ensuring effective access to government held information by persons who are unable to use information provided in the usual printed format. Low vision, blindness or inability to read can be barriers to access unless information is provided in alternate formats.

In 1988, the Ontario *Human Rights Code* was amended to establish the principle of reasonable access by disabled persons to goods, services, facilities and employment. Management Board Secretariat responded in 1989 by issuing Directive 5-4, a new mandatory policy governing the provision of information for the "print handicapped." Ministries and agencies were directed to "make every reasonable effort to comply with individual requests from print handicapped persons for access to government institutions." Alternate formats could include audio tape, large print, braille and the provision of the services of a reader.

The Commissioner has also addressed the issue in Order P-540. The appeal concerned an access request by a visually impaired person to his own personal information. The Commissioner ruled that although the Act only required the institution to provide the information in an "objectively" comprehensible way, this obligation must be read subject to the *Human Rights Code*, with the result that the institution was required to take steps to assist the requester to effectively access

his personal file. Had the institution not taken such steps as providing part of the record in large print and arranging for someone to read and review the file with the requester, the requester's rights as a disabled person under the *Human Rights Code* would have been infringed.

In a postscript to the Order, the Assistant Commissioner urged the government to deal with access of visually impaired persons to both their own personal information and to general records through amendments to the Act. He said:

> . . . [T]here is a need for the Government of Ontario to clearly establish the obligations of institutions when responding to access requests filed by visually impaired requesters . . . . such direction should, ideally, be provided within the provincial and municipal Acts themselves.

The federal *Access to Information Act* and the *Privacy Act* have recently been amended to provide rights of access for individuals with sensory disabilities. Institutions are now obligated to provide access in an alternative format (meaning a format that allows a person with a sensory disability to read or listen to that record). Section 12(3) of the federal *Access to Information Act* provides:

> 12(3) Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given has a sensory disability and requests that access be given to the person in an alternative format, a copy of the record or part thereof shall be given to the person in an alternate format.
>
> (a) forthwith, if the record or part thereof already exists under the control of a government institution in an alternative format that is acceptable to that person; or
>
> (b) within a reasonable period of time, if the head of the government institution that has control of the record considers the giving of access in an alternative format to be necessary to enable the person to exercise the person's right of access under this Act and considers it reasonable to cause that record or part thereof to be converted.

A criticism of this model is that it gives the institution too much discretion. The head may determine whether an alternative format is "necessary" and whether it is "reasonable" to convert the record.

The aim of the legislation to provide access to information held by public institutions is frustrated when access is not meaningful and effective. Where information is provided only in the print format, whole segments of the public may be excluded from meaningful access. The *Human Rights Code* already recognizes the need to make reasonable accommodation in the provision of services to persons with disabilities. The Committee supports the inclusion of this principle in the Act by making reasonable accommodation through alternative formatting to ensure greater access to government held information by persons with sensory disabilities.

There is, however, concern about the cost implications of this proposal, particulary in the current recessionary climate. The Committee was urged by one witness to ensure that the fees levied for producing the record in alternate formats never exceed the fees for providing the print alternative, even if the costs to the institution are greater. However, many of the institutions appearing before the Committee spoke of the financial hardship that the legislation currently imposes and urged the Committee not to impose additional barriers by way of amendment to the Act.

Cognisant of the tension between the need to ensure meaningful access and shrinking financial resources, the Committee believes that further consideration should be given as to how reasonable accommodation through alternate formatting can best be effected in light of these limitations.

The Committee, therefore, recommends:

33. *that the Act be amended to provide increased access to persons who are print handicapped through alternative formatting of general records and personal information;*

34. *that the fees for providing records in alternative formats should not exceed the fees charged for providing the information in print format; and*

35. *that further consideration should be given to the cost implications of these amendments to ensure that they can be implemented in the most cost efficient but effective manner.*

General Access

In addition to providing meaningful access for persons who are unable to use print formats, alternate formats may in some instances and to some requesters simply be more useful and less costly than the print copy. Such alternatives are becoming increasingly commonplace given the dramatic advances in electronic information technology. There is, however, no clear obligation in the Act for institutions to provide information in the format requested. Under the current legislation, institutions might refuse to provide access to electronic records if they can provide paper copies.

Other jurisdictions have recognized the advances in electronic information technology and have made amendments in their legislation to take advantage of them. Nova Scotia, while not imposing an obligation to provide electronic copies of records, permits the head to do so. Quebec's legislation similarly contemplates access to computerized records by allowing the institution to provide an electronic copy of the record. The State of Connecticut has enacted the clearest statement on the issue by imposing an obligation on institutions to provide access to public records in the form most appropriate to the requester. In regard to computer-stored records, the legislation provides that:

> Any public agency which maintains public records in a computer storage system shall provide, to any person making a request pursuant to this chapter, a copy of any non-exempt data contained in such records, properly identified, on paper, disk, tape or any

> other electronic storage device or medium requested by the person, if the agency can reasonably make such a copy or have such copy made.

The Committee believes that while the issue of alternate formatting may not have figured prominently in the past, the use of computers has and will continue to expand among individuals, businesses and government organizations.

The Committee, therefore, recommends:

36. *that section 23 of the Act be amended to provide an explicit obligation for the institution, whenever possible, to provide access in the medium specified by the requester, unless it would be unreasonable to do so.*

PROTECTION OF PERSONAL PRIVACY - PART II

Application of Part II

Designation of Public Record

Section 27 provides:

> This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public.

The Act does not clearly define what constitutes a "record that is available to the general public" or how a record is so designated. In practice, records are designated as "public records" either by statute or institutional policy.

The Information and Privacy Commissioner is concerned that designations by policy rather than statutory authority, leave too much discretion with the institution. Designations by policy do not allow for government or public consultation or scrutiny. Moreover, they are subject to being based on inadequate

or inappropriate factors such as the generation of non-tax revenue in times of economic restraint.

It is apparent that the current practice of designating personal information as part of a public record either by statute or policy is long-standing and well established. In addition, it is noted that some of the public records in the province are governed by policies that are outside of the provincial government's jurisdiction such as the policies concerning criminal records. Requiring all designations to be made by statute would not only require the amendment of many existing statutes but also would inject the rigidity and delay of the legislative process into the system by subjecting any future or ongoing changes to such designations to the lengthy and, in many instances, unnecessary legislative process.

The Committee believes that a designation of personal information as a public record should be open to public scrutiny and input instead of being left to the discretion of the head of any particular institution.

The Committee, therefore, recommends:

37. *that section 27 of the Act be amended to require that records containing personal information can be designated as a public record only by statutory authority, not by policy.*

Availability of Personal Information

Another issue concerning the application of Part II is that section 27 allows institutions, that are not mandated to collect the personal information for the purpose of making it available to the public, to claim the exclusion where another institution has collected it for that purpose.

Personal information held by an institution which is not mandated to collect it for the purposes of creating a public record may be open to abuse in that such an institution does not have the same level of accountability for the accuracy and

currency of the information as an institution that is mandated to collect the information. In addition, institutions that are not mandated to collect the information may not be covered by the Act. Thus, large amounts of personal information will be unprotected. Instead, the section should be narrowed to limit the exclusion to those institutions which are specifically mandated to collect personal information for the purpose of creating a public record.

The Committee believes that such an amendment would strengthen the privacy protection provisions of the Act and reduce the possibility of the abuse or misuse including the sale, unauthorized use, and computer matching of personal information.

The Committee, therefore, recommends:

38. that section 27 of the Act be amended as follows:

> *27. This Part does not apply to personal information maintained by an institution for the purpose of creating a record that is available to the general public.*

Public Registers

The final issue related to section 27 is that it excludes from protection personal information contained in "public registers" such as assessment rolls, electoral lists and land registry records. Again, the concern of the Information and Privacy Commissioner is that the use of such personal information is open to abuse by third parties who are not subject to the Act.

New Zealand has dealt with the issue of balancing the protection of personal information in public registers with the legitimate public right to access in their *Privacy of Information Act*. The Act establishes the following as the Public Registers Privacy Principles:

> Personal information shall be made available from a public register only by search references that are consistent with the manner in which the register is indexed or organized.
>
> Personal information obtained from a public register shall not be re-sorted, or combined with personal information obtained from any other public register, for the purpose of making available for valuable consideration personal information assembled in a form in which that personal information could not be obtained directly from the register.
>
> Personal information in a public register shall not be made available by means of electronic transmission, unless the purpose of the transmission is to make the information available to a member of the public who wishes to search the register.
>
> Personal information shall be made available from a public register for no charge or for no more than a reasonable charge.

In the Committee's view, it would be impractical to extend the Act's privacy protection provisions to all of the personal information maintained in public registers. It would mean that the vast amount of information that is considered "public" and to which the public currently has access such as land registry and Ministry of Transportation driver's licence records, would be subject to all of the collection, notification, use, disclosure and disposal procedures under the Part II. This could create tremendous operational demands on the institutions and may require a whole new level of bureaucracy to handle the added workload of complying with the privacy provisions. The Committee therefore, does not support this recommendation.

Definition of The Term Collect

Part II of the Act governs the collection of personal information by institutions. In particular, section 28(2) provides:

> "28(2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by

statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity."

In addition, many of the duties of institutions and the rights of individuals under Part II are dependent upon whether or not personal information is considered to have been collected; however, the term is not defined in the Act. It was reported to the Committee that the absence of such a definition has led to confusion and misinterpretation of the Act.

The Committee agrees that a definition of collect should be added to the Act to clarify the "triggering event" of many of the rights and duties under Part II.

The Committee, therefore, recommends:

39. *that the term "collect" be defined for the purpose of Part II of the Act. The definitions should provide that for personal information to be collected, the institution would have to retain recorded information in an organized fashion so that only those records which are reasonably retrievable by the institution have been "collected" within the meaning of the Act. Information which is received, but not retained beyond the time necessary for a decision to be made not to retain it, should not be considered to have been collected. Furthermore, information retained in an organized fashion would be considered to have been collected regardless of whether it was unsolicited or solicited by the institution and regardless of the manner of collection, whether direct or indirect.*

Notice of Collection of Personal Information

Section 29 regulates the way in which personal information is to be collected. Subject 29(2)(a) requires that where personal information is collected by an institution, the head must inform the individual concerned of the "legal authority" for the collection.

It is unclear whether this provision obligates the head to state the specific or just the general legal authority. The concern was that if the legal authority is identified only in general terms, it will be difficult for the individual to whom the

information relates to challenge the authority or to make informed decisions regarding the collection.

In its 1991 report, the Committee accepted the recommendation to require notification of the specific legal authority, noting that some laws impose a penalty on individuals if they do not provide certain information to an institution. The Committee continues to be of the view that individuals need to know the terms of the statutory obligation to provide the information and the penalties for failure to do so if they are to make an informed decision about whether to provide the institution with the personal information.

The Committee, therefore, recommends:

40. that subsection 29(2)(a) be amended to state:

> *29(2) If personal information is collected on behalf of an institution, the head shall inform the individual of whom the information relates of,*
>
> *(a) the specific legal authority for the collection.*

Collection of Health Card Numbers

Under section 28(2), the collection of personal information on behalf of an institution is prohibited unless the collection is expressly authorized by statute, used for the purposes of law enforcement or is necessary to the proper administration of a lawfully authorized activity.

Some school boards questioned whether this section is sufficient authority to allow them to collect students' health card numbers. The numbers are required by the school boards to ensure that in cases of medical emergency the student will receive prompt, appropriate medical attention. According to several school boards, contradictory opinions from the Ministry of Health as to whether this authority exists under the Act has simply added to the confusion.

In the Committee's view, the authority of schools to collect student health card numbers must be clearly set out in legislation. Because schools are charged by statute with the responsibility of supervising students who are participating in school programs such as athletic events, outdoor education activities and overnight excursions, they must be in a position to respond quickly to medical emergencies. Prompt access to a student's health card number is necessary to fulfil this responsibility.

The issue was also considered in the broader context of youth activities including voluntary participation in recreational and athletic activities sponsored by volunteer organizations. Clearly, the rationale of medical emergency also applies in these contexts but none of these organizations is covered by the legislation or is mandated by statute to conduct the activities as are schools and school boards. The Committee believes that the issue requires further study before any recommendation can be made.

All of these considerations may take on a different complexion if, in the future, the health card system is changed so that medical or other information regarding the individual can be accessed through the card or number. Protection of privacy concerns would have to be re-assessed and consideration would have to be given as to how the new system could be made to meet the need for prompt access to health card numbers that is addressed by the Committee's recommendation.

The Committee, therefore, recommends:

41. that an amendment be made to the appropriate statute to clearly set out the authority of schools to collect and maintain student health card numbers.

Security of Personal Information

Section 47(c) of the Act gives the Lieutenant Governor in Council the power to make regulations:

> 47(c) setting standards for and requiring administrative, technical and physical safeguards to ensure the security and confidentiality of records and personal information under the control of institutions.

Pursuant to this authority, section 3 of Ontario Regulation 823 addresses unauthorized access and the inadvertent destruction of records. There is, however, no provision in the Act which imposes a specific legal duty on an institution to ensure the security of personal information in its custody or under its control.

Arguably subsection 30(2) imposes such an obligation by necessary implication. It provides that,

> 30(2) The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date.

Concerns about the security of personal information prompted more than one witness to suggest that the obligation should be made explicit in the Act. In its 1991 review of the provincial Act, the Committee noted that there is a direct relationship between the safekeeping of personal information and the protection of privacy of individuals and recommended that the duty to safeguard such information be made explicit in the Act. The Committee believes that the continuing advances in electronic information technology and its increased use by individuals, businesses and governments make these concerns even more pressing today.

The Committee, therefore, recommends:

42. *that section 30 of the Act be amended to add the following provision:*

> *An institution shall ensure that personal information in its custody or under its control is protected by such security safeguards as are reasonable in the circumstances to prevent loss or unauthorized access, use, modification or disclosure.*

Use, Disposal and Disclosure of Personal Information

Inconsistent Wording

Section 30(4) deals with the disposal of personal information "under the control of the institution." It was pointed out to the Committee that this wording is inconsistent with other provisions in Part II which refer to personal information "in the custody or under the control of the institution."

There is no apparent reason for this inconsistent wording. To avoid confusion and misunderstanding of the Act, the section should be amended to accord with the wording in other sections of Part II.

The Committee, therefore, recommends:

43. that section 30(4) be amended as follows:

> *30(4) A head shall dispose of personal information in the custody or under the control of the institution in accordance with the regulations.*

Inconsistent wording is also used in sections 31 and 32 of the Act, governing the use and disclosure of personal information. Personal information under the Act relates to recorded information about an "identifiable individual." Sections 31 and 32 instead use the term "person." Although not defined in the Act, the term "person" under the *Interpretation Act* includes corporations and is therefore broader that the term "individual."

The use of two different terms may create unnecessary confusion and misinterpretation. A change to a consistent use of "individual" in these sections will eliminate the inconsistency.

The Committee, therefore, recommends:

44. *that sections 31 and 32 be amended to read as follows:*

31. An institution shall not use personal information in its custody or under its control except,

(a) if the individual to whom the information relates has identified that information in particular and consented to its use;

32. An institution shall not disclose personal information in its custody or under its control except,

(b) if the individual to whom the information relates has identified that information in particular and consented to its disclosure.

Unilateral Disclosure

Section 32(a) permits an institution to disclose personal information in its custody or under its control "in accordance with Part I" of the Act. It is unclear, however, whether disclosure is permissable only in the context of a request for access or also where no request has been made and the information is released unilaterally by the institution.

The Committee was advised that currently, in order to justify unilateral disclosure of personal information (i.e., in the absence of a request for access) municipal institutions, have relied on section 32(a) in combination with section 14, the personal information exemption. The concern is that in the absence of a request, the Act does not require the person to whom the information relates to be notified of the disclosure. Thus, a unilateral disclosure by an institution deprives the person of the opportunity to be heard on the issue of whether his or her personal information should be disclosed.

Recently, the Information and Privacy Commissioner ruled that section 32(a) applies only in the context of a request for information having been made under Part I of the Act (Part II of the provincial Act).

The Committee believes that an amendment to section 32(a) to incorporate the Commissioner's ruling will clarify that an institution may only disclose personal information pursuant to a request under Part I. This amendment will strengthen one of fundamental purposes of the Act, that is, to protect the privacy of individuals. At the same time, the amendment will not significantly erode public access to government held information, since it will apply only to personal information.

The Committee, therefore, recommends:

45. *that section 32(a) be amended to clarify that the section applies only in the context of a request for access to personal information under Part I of the Act.*

Consistent Purpose

Sections 31(b) and 32(c) permit the use and disclosure of personal information for the purpose for which it was obtained or compiled or for a "consistent purpose." Section 33 provides that where personal information has been collected directly from the individual, the purpose of a use or disclosure is a "consistent purpose only if the individual might reasonably expect such use or disclosure." The constraint on the use of personal information in section 33 does not apply if information has been collected indirectly. It was also suggested that the "reasonable expectation" test is vague and liable to a broad interpretation.

In the Committee's view, there is no reason why the consistent purpose rule should apply to information that is collected directly from the individual but not to information that is collected indirectly. Such information is equally open to misuse and should be afforded the same protection.

The Committee believes that the inconsistency should be removed and that the "consistent purpose" test could be further clarified with the introduction of a more objective standard.

The Committee, therefore, recommends:

46. *that section 33 be amended by deleting the reference to directly collected information and instead providing that the purpose of a use or disclosure of personal information is a consistent purpose under sections 31(b) and 32(c) only if the purpose has a reasonable and direct connection to the original purpose.*

Disclosure of Personal Information to Outside Contractors

Section 32(d) does not explicitly provide for the disclosure of personal information to persons outside the institution such as legal counsel, consultants, auditors, translators and others who provide necessary and proper services to the institution.

The Information and Privacy Commissioner proposes that disclosure of personal information to persons providing services to institutions should be permitted but only under the same conditions that apply to the disclosure to officials or employees of the institution (i.e., the record must be needed for the performance of duty and the disclosure is necessary and proper in the discharge of the institution's functions.) To ensure that these conditions are met, the Act should require institutions to enter into contractual agreements similar to the research agreements referred to in section 14(1)(e), prior to personal information being disclosed.

The Committee, therefore, recommends:

47. *that section 32 of the Act be amended to include a provision stipulating that disclosure of personal information to persons providing services to government institutions is only permissible under terms and conditions similar to those applying to the conditions for research agreements set out in section 14(1)(e).*

Application to School Boards

Introduction

A number of the submissions from school boards suggest particular problems with the application of the privacy protection provisions of the Act to the operations of schools and school boards. The interrelationship of the Act with other education-related statutes has been a source of particular concern to the several school boards that appeared before the Committee. It has been suggested that schools and school boards have unique privacy needs which would be better addressed in the context of the education system under the *Education Act*, instead of in the context of a law of general application to a whole range of functionally unrelated institutions.

Education-related Statutes

The Ontario Teachers' Federation is required under the *Teaching Profession Act* to collect membership fees from all members (virtually all teachers in the province) according to a formula based on the salary of each teacher. The Federation informs the Committee that some school boards have been reluctant to report the actual salaries of its teachers to the Federation because, under the Act, a person's salary is personal information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The *Teaching Profession Act* also mandates the Federation to conduct inquiries and to hold hearings in cases of alleged professional misconduct or unethical conduct of its members and to consider applications for reinstatement of teaching certificates. School boards have also been reluctant to provide evidence relating to disciplinary matters to the Relations and Disciplinary Committee of the Federation on the basis that such disclosure would constitute an unjustified invasion of personal privacy.

Although section 32(e) clearly authorizes the disclosure of personal information for the purpose of complying with an Act of the Legislature or an Act of Parliament, confusion and uncertainty persists.

A related concern is the application of the Act to labour relations in the context of the education-related statutes which govern these matters. In particular, the *Education Act* requires that terminations of teachers be made by the board of trustees but provides that the issue may be considered by a committee of the board in a closed meeting. However, in order for a termination to have been validly made, there must be evidence that the trustees themselves, rather than just the administrative arm of the board, actually dealt with the termination. School boards are concerned that unless the names of the terminated employees are reported to the board in public session and are subsequently included in the board minutes, which are public under the *Education Act*, the validity of the terminations may be questioned.

School Activities

A number of the school boards also expressed frustration with the formality and rigidity that the privacy provisions of the Act have injected into student activities. For example, activities such as publishing the school year book, taking class photos, having local media cover school sporting events and the displaying of students' essays have ceased to be everyday occurrences due to the privacy protections in Part II of the Act. More than one witness reported that there is now confusion and uncertainty about how the Act applies to these activities. A requirement that a consent be obtained for each and every student is impractical, time-consuming and formalistic. It is clear that a more common sense approach to the application of the Act is needed.

Management Board Secretariat has suggested that the Act already makes provision for these types of activities in section 32(c) which allows the institution to disclose personal information if it is disclosed for the purpose for which it was compiled or

for some other consistent purpose. Under section 33 a consistent purpose is one which the individual might reasonably have expected. The reasonable expectations of students and parents must be considered and, it is suggested, such expectations would include many of these activities. School boards maintain that the collection of the personal information is so removed from the subsequent use in for example, the yearbook, that the reasonable expectations provision does not apply. From all of the evidence, it is clear to the Committee that there continues to be widespread uncertainty and unease with the application of the Act to schools and school boards.

The Committee is very concerned about the apparent pervasiveness of the frustration and confusion being experienced by school boards concerning the application of the privacy protections of the Act to schools. Although much of the frustration may be due to insufficient education about the specific application of the Act to the school system, the Committee believes that further investigation by the Management Board Secretariat of the reasons for this confusion is warranted.

The Committee, therefore, recommends:

48. *that Management Board Secretariat specifically target and direct public education and awareness programs to the education sector with a view to addressing the concerns expressed in this report regarding the application of the privacy provisions of the Act to school boards and the interrelationship with the other education-related statutes; and*

49. *that Management Board Secretariat immediately undertake a review of the unique privacy needs of school boards, including the provisions of the existing education-related statutes, to determine how these needs may be more appropriately met in the context of the Act or, if necessary, outside the Act.*

SOCIAL ASSISTANCE RECIPIENTS

The Committee was urged by a number of witnesses to recommend changes to the Act to ensure that the identity of social assistance recipients is not disclosed to elected officials.

Section 14(3) of the Act provides that the disclosure of information relating to an individual's eligibility for social assistance or welfare benefits, employment history or an individual's finances or income is presumed to be an unjustified invasion of personal privacy.

However, access by local councillors to the names of the people in the municipality who are receiving welfare is made possible by two provisions in the Act. First, the term "institution" includes a municipality, the head of which is the municipal council as a whole unless the council elects to designate an individual or committee as the head. As head, the council has access to all records held by an institution. Because of this framework, the release of information about welfare recipients to a municipal council would not be governed by Part I of the Act and therefore, would invoke none of the procedural protections (such as notice to the person about whom the information relates) of that Part.

Second, section 32(d) has been relied on in at least two instances to authorize the release to municipal councillors of the list of welfare recipients in the municipality. Section 32(d) provides:

> 32. An institution shall not disclose personal information in its custody or under its control except:
>
> . . .
>
> (d) if the disclosure is made to an officer or employee of the institution who needs the record in the performance of his or her duties and if the disclosure is necessary and proper in the discharge of the institution's functions.

In 1990, the Hastings County Council passed a resolution that the list of welfare recipients in the County be released to the whole Council. The stated rationale for the resolution was to enable the Council to investigate recipients to ensure that they qualify for assistance, and to enable the Council members "to alert welfare recipients to the existence of any jobs that came to the attention of Council members." The resolution was successfully challenged. The Court held that the requirements of section 32(d) had not been met because there was no evidence of the "need" of councillors to know the names of recipients or that the information was "necessary." The judgement implies that a release of such information to councillors would be proper if the Council had brought forward evidence of their "need" for and the "necessity" of the information.

The Court also queried whether municipal councillors were "officers" within the meaning of the section. In this regard, the Information Privacy Commissioner suggested to the Committee that confusion has been created because section 32(d) does not contain a definition of "officer." It was proposed that the term be defined to clarify the instances in which a municipal councillor may be considered to be an "officer" of the municipality for the purposes of obtaining personal information contained in records under the custody or in the control of a municipality.

More recently in 1993, the Lambton County Council passed a similar resolution requiring the county welfare administration to provide a list of welfare recipients to the County Warden. The rationale for the resolution was to police cases of welfare fraud.

Those opposed to allowing municipal councillors to have access to the identities of recipients of social assistance cite the social stigma associated with receiving welfare and the harassment and discrimination suffered by recipients when it becomes known that they are receiving social assistance. One of the community legal clinics that appeared before the Committee on this issue, stated:

> It is a fundamental and inescapable fact that receipt of welfare can be both personally shaming for many people and socially stigmatizing.
>
> People living in deep poverty are already in a state of financial and emotional crisis. The possibility that their status could become public knowledge causes many people tremendous anxiety even if there are no other consequences of the disclosure.
>
> However, this is not the only reason why confidentiality is important. There is overwhelming evidence that welfare recipients are routinely discriminated against in respect of accommodation and other services. The problem of discrimination in housing is so severe that the Ontario *Human Rights Code* was amended to specifically prohibit this discrimination. Welfare recipients are frequently harassed and degraded when their source of income becomes known. Sometimes despite confidentiality rules, this information becomes public knowledge. In these situations, recipients and their families have been subjected to threats, physical assaults and other kinds of harassment.

Opponents to local council access also argue that councillors have no "need to know" the identity of social assistance recipients because responsibility for day-to-day welfare administration lies with the welfare administrator, a paid official trained to administer the program with expertise in determining eligibility and welfare fraud. Councillors have no such expertise to determine welfare fraud or welfare entitlement. Recipients also fear that they will become political scapegoats in difficult economic times. Finally, it was suggested that there is no evidence that welfare fraud is a major problem in Ontario. The evidence, it was suggested, is to the contrary, with the most generous studies reporting that welfare fraud accounts for three percent of payments made; other studies show that it is as low as one percent.

Proponents of allowing elected officials to have access to the list of welfare recipients argue that the principle of public accountability requires that officials elected to ensure the prudent expenditure of public funds have access to such information in appropriate circumstances. Welfare fraud threatens social assistance programs and is a waste of public funds for which elected officials are

ultimately responsible. One municipality estimated that welfare fraud within the municipality is conservatively as high as two to three percent of payments.

This issue was considered by the Committee during its 1991 review of the provincial Act. The Committee concluded that the particular sensitivity of social assistance information must be recognized and the issue of access to such information needs to be specifically addressed in both the provincial and municipal Acts. In recommendations 39 through 42 the Committee recommended that:

- institutions intending to use or disclose personal information without the consent of the individual concerned should be required to justify the proposed use or disclosure where the legitimacy of the proposal is challenged;

- institutions should be required to consider all reasonable alternatives to a proposed use or disclosure of personal information, and to implement the method that will have the least intrusive effect on personal privacy;

- the Act should be amended to define the department of social services of a municipal corporation as a separate institution; and

- both the provincial and municipal legislation should be amended to specify which government officials have a "need to know" information about social recipients.

During the course of the current hearings, objections to these recommendations were raised. With respect to requiring the institution to consider alternatives to a proposed disclosure of personal information without the person's consent and to implement the method that will be the least intrusive, one of the municipalities noted that all of the uses and circumstances of disclosure listed in sections 31 and 32 are proper and there should not be an obligation to favour obtaining consent over all other legitimate options; to do so would be unreasonable and would create administrative complexity, delay and cost.

The recommendation to designate the welfare department as a separate head was also rejected because it would interfere with local public accountability and would impose additional administrative costs on the welfare system by requiring each

municipal social service department to hire its own freedom of information staff, rather than making use of the municipality's staff.

Objection to the recommendation to specify classes of employees who have a "need to know" under section 32(d) was made on the basis that it would provide greater protection for information about social assistance recipients than for information about other members of the public. In this context, the question was asked as to how the Committee could recommend disclosure of the salaries of public servants while at the same time recommend greater protection for the identity and payments made to social assistance recipients.

The Committee believes that the social stigma attached to receiving public assistance, the potential for improper use of this information and the profound implications of such misuse justifies the difference in treatment of information regarding social assistance and public servant salaries.

The Committee re-affirms its concern about the need to recognize the particular sensitivity of social assistance information and its belief that the recommendations made previously in its 1991 report should be implemented to ensure that information regarding welfare recipients is not subject to misuse.

The Committee, therefore, recommends:

50. that recommendations 39 - 42 of the 1991 Report of the Standing Committee on Legislative Assembly on the Freedom of Information and Protection of Privacy Act, 1987 be incorporated as amendments to MFIPPA.

Welfare Administration in Unconsolidated Regions

Witnesses have suggested that the potential for improper use of social assistance information is much greater in unconsolidated municipalities, where typically there is no full-time welfare administrator and municipal politicians are directly involved

in delivery of services. Councillors are often the only ones with signing authority for the welfare cheques. The release of the identity of recipients in these municipalities is more likely to have harmful consequences, as the municipalities are typically small and close-knit, with councillors usually knowing the recipients personally.

The Committee believes that the welfare program delivery practices of unconsolidated municipalities should be scrutinized more carefully, particularly in light of the concerns the Committee has already expressed in relation to the need for additional recognition of the sensitivity of social assistance information.

The Committee, therefore, recommends:

51. that the Information and Privacy Commissioner should immediately engage in an investigation of the practices of welfare delivery in unconsolidated municipalities to determine whether all possible steps are taken to ensure confidentiality.

THE APPEAL PROCESS - PART III

Procedure

Extending the Appeal Period

Any decision of a head may be appealed to the Commissioner. Section 39(2) provides that the appeal must be filed within 30 days after notice of the decision being appealed from was given. The provision is mandatory and there is no authority in the Act for the Commissioner to extend the time for filing an appeal, even where the extension might be justified and no significant prejudice would result.

In Order 155, former Commissioner Linden, in a case involving the equivalent section of the provincial Act, ruled that the section should be interpreted liberally in favour of access to the process rather than strictly so as to deny access. He

held, in effect, that the Commissioner had the authority to extend the appeal period in special circumstances, for example where the lapse of time beyond the 30 day time limit is not significant and there is no prejudice to the institution. According to this Order, each case must be considered on its own facts.

In 1991, during the Committee's review of the provincial Act, the Information and Privacy Commissioner proposed an amendment to codify this decision. The Committee adopted the proposal, noting

> It is important that rigid adherence to time limits should not prevail over fairness to users of the Act. In the view of the Committee, the principles of the Act would be better served if the Act is flexible enough to accommodate special circumstances. In this respect, permitting the Commissioner to extend the time for filing an appeal to reflect the circumstances of each case is preferred over establishing another fixed time limit . . . .

The Committee believes the same reasoning applies to appeals under the municipal Act.

The Committee, therefore, recommends:

52. *that section 39 of the Act be amended by adding the following subsection:*

> *39(2a) The Commissioner may extend the 30 day time period referred to in subsection (2) where special circumstances exist.*

Notice to Affected Persons

Section 39(3) of the Act requires the Commissioner, upon receipt of a notice of appeal, to notify the head of the institution and all affected persons. There is no definition of "affected person" in the Act and the determination as to whether a person is affected by an appeal is made by the Commissioner based on the facts of each appeal. It was pointed out that there are circumstances where notification to an affected person is unnecessary or inappropriate, but there is currently nothing

in the Act giving the Commissioner discretion to decide whether to notify or not. Where, for example, sensitive personal information is not likely to be disclosed in the appeal (e.g., where the appeal concerns the fee estimate or refusal to waive the fees), where it would be reasonable to assume that notification to the affected party would result in unnecessary shock or anxiety, or where the appeal concerns a request for information about each member of a class of people (e.g., a mailing list), notification of the filing of an appeal to all affected persons may not be necessary or appropriate.

The Committee believes that the Commissioner should have the discretion to decide, based on the facts of each case and on the issues under appeal, whether notification of the appeal is necessary or appropriate for each of the "affected persons." This amendment will ensure that only those whose interests are at issue in the appeal will have the opportunity to make representations, which in turn will reduce unnecessary costs and delay in the appeal process.

In its 1991 report on the provincial Act, the Committee heard evidence that there was confusion about the definition of "affected person" in subsection 50(3), the equivalent of MFIPPA, section 39(3). To eliminate the confusion, the Committee recommended that reference to "affected person" in subsection 50(3) be removed and replaced with a specific list of persons who should be notified of an appeal.

In the Committee's view, combining the 1991 Committee recommendation with a provision granting the Commissioner the discretion to notify an affected person where it is appropriate to do so will resolve both concerns.

The Committee, therefore, recommends:

53. that section 39(3) be amended to read as follows:

39(3) Upon receipt of a notice of appeal, the Commissioner shall inform the head of the institution and <u>may inform</u> any of the following:

(a) the requester;

(b) any person who was given notice of the request under section 21(1); and

(c) any person who should have been given notice of the request under section 21(1) if the head had intended to grant access to the record,

of the notice of appeal.

Time Limits on the Appeal Process

The Act imposes rigorous time limits on the initial request stage of the Act and on the filing of an appeal, but none on the appeal process itself. Several witnesses objected to having to comply strictly with such time limits while having to face significant delays in the conduct of appeals and in the rendering of orders.

This same concern was raised in the Committee's 1991 review of the provincial Act. Since then, the Information and Privacy Commissioner has developed and implemented a two-stage, five year strategic plan for reducing the complexity and the delay of the appeal process. The first phase was implemented in October 1992 and was designed to increase efficiency and improve service within the Office in the short term. Phase two, effective January 1993, was to bring more fundamental changes to the appeal process through a pilot project, the chief objective of which was to test new approaches to processing appeals more effectively to make the process more time-driven rather than paper-driven. The strategic plan was designed to meet a standard of completing 95 percent of all appeals within four months. The success of these initiatives is being evaluated on an ongoing basis.

Statistics compiled by the Commissioner for 1992 and 1993, the most recent period for which they are available, indicate that 1090 appeals were filed with the Information and Privacy Commission in 1992, a 28 percent increase over the 1991

figure. In 1993, a total of 1221 appeals were received which was a 12 percent increase over 1992.

According to the Commissioner,

> Although the IPC continues to receive a growing number of appeals each year, the agency has been equally successful in resolving these appeals. In 1992, for example, a total of 1122 appeals were closed, representing an 82 percent increase over the previous year. In 1993, a total of 1403 appeals were completed which represents a significant 25 percent increase over the 1992 level. As a result of the success in closing appeals, there has been a steady decrease in the total inventory of appeals. By the end of 1993, the inventory had dropped by 41 percent compared with the total at the end of 1992.
>
> In addition to closing a greater number of appeals, the Appeals department has been successful in reducing the overall time that it takes to process appeals. In 1993, over 70 percent of appeal files were completed within six months. In addition, the average age of an open file fell from 167 days in the first quarter to 136 in the last quarter.

Other jurisdictions have imposed statutory time limits on the appeal process. British Columbia, for example, has stipulated a 90 day time limit from the date of filing the appeal within which the appeal must be completed. The Act has been in force only since October 1993 and it is therefore too early to evaluate their experience with the time limits.

Timely access to information is critical to the principle of effective access because the sensitivity and value of information diminishes over time. Delay in the processing of appeals therefore, is a matter of great concern to the Committee.

However, as was noted in the Committee's 1991 report on FIPPA, there are good arguments for not imposing strict time limits on the appeal process: notably, that they would, of necessity, result in less thorough investigations by the Commissioner's Office; that cases would have to be presented before they are

ready to be argued; and, ultimately all of this would result in poorer decisions being rendered. The mediation process, which has been an integral and successful part of the appeal process to date, would be short-circuited by time limits which push cases on too quickly to the hearing stage. In addition, the imposition of time limits as suggested would have significant staffing and cost implications for the Commissioner's Office.

In the Committee's view, the initiatives undertaken by the Commissioner's Office to deal with delay in the appeal process must be given time to take effect and to be evaluated before the imposition of time limits is considered. The potentially significant cost implications of statutory time limits to the operations of the Commissioner's Office must also be assessed before a decision to impose limits is made.

The Committee is concerned, however, about the continuing reports of delay at the appellate level.

The Committee, therefore, recommends:

54. *that Management Board Secretariat and the Information and Privacy Commissioner evaluate as quickly as possible the delay-cutting initiatives of the Information and Privacy Commissioner and that they continue to aggressively monitor the appeal process to ensure that cases are being dealt with expeditiously.*

Examination of Original Records

Section 41(4) provides that during the course of an inquiry, the Commission may require an institution to produce for examination any record held by the institution. Despite this authority, a strict reading of section 41(6) allows the head of an institution, for any reason whatsoever, to require the Commissioner to examine the original record at its site. Moreover, section 41(6) could also be

interpreted to mean that where the head requires the examination of the original record on site the head may refuse to provide the Commissioner with a copy.

There is nothing in these sections to circumscribe the reasons for which the head may require the Commissioner to examine the original record on site. It was pointed out to the Committee that this omission has already led to delays in the processing of appeals. In addition, there is the potential for the resources of the Commissioner to be particularly taxed where the site of the original record is outside Metropolitan Toronto. The unnecessarily broad wording of the Act fails to strike a balance between the legitimate interests of institutions which may be called upon to produce for the Commissioner large volumes of records and the need for the efficient processing of appeals.

In the view of the Committee, section 41(6) should be narrowed to permit the head of an institution to require on-site inspection of an original record only where it would not be reasonable to reproduce the record due to the nature or length of the record. In all other cases, an institution should be required to produce a copy of the record. The Committee notes that this concern was raised in the 1991 review of FIPPA and that the same recommendation was made with respect to the equivalent section in the provincial Act.

The Committee, therefore, recommends:

55. *that section 41(6) be amended to read:*

> *41(6) Despite section (4), a head may require that the examination of a record by the Commissioner be of the original at its site <u>where it would not be reasonably practicable to reproduce the record or a part thereof by reason of its length or nature.</u>*

GENERAL - PART IV

Powers and Duties of the Information and Privacy Commissioner

Introduction

The Information and Privacy Commissioner has made several recommendations to the Committee regarding changes to the powers of the Commissioner. Many of the proposed changes amount to making explicit, powers that are necessarily implicit to the functions mandated in the Act and that are already being exercised in that context. There is some concern therefore, that if these powers are made explicit in the Act, the change will be perceived as a directive to exercise new powers; rather than as an acknowledgement that these powers are being exercised as necessarily implicit to the powers set out in the Act. The most serious adverse effect of this erroneous perception would be the cost implications, not only to the institutions, but more directly to the Commissioner's Office, of an increase in Commission staff and other associated operational expenses to exercise these new powers. In all of these recommendations to expand or make explicit the powers of the Information and Privacy Commissioner, the Committee wishes to make very clear that they should not result in an increase in operational costs to the Office of the Commissioner and to institutions. If any of the Committee's recommendations should have the effect of adding to the workload or responsibilities of the Office of the Information and Privacy Commissioner, the Committee wishes to hear further from the Commissioner concerning the cost implications.

Investigatory Powers

Except in the context of an inquiry, there is no specific provision in the Act giving the Commissioner the power to initiate a review of the access procedures of an institution to ascertain whether the institution is complying with the requirements of the Act. Nor does the Act specifically authorize the Commissioner to initiate a review of records of personal information in the custody and under the control of

institutions, or to investigate an act or practice of an institution to ascertain whether the institution is complying with the collection, use, disclosure and retention requirements of Part II of the Act.

Despite the lack of specific review and investigatory powers, the Act requires the Commissioner to carry out certain functions which cannot be performed in the absence of these powers. Specifically, section 46(b) authorizes the Commissioner, after hearing from the head of an institution, to order that the institution cease a collection practice and destroy collections of personal information that contravene the Act.

Arguably, therefore, the powers to review access procedures and investigate the privacy practices and records of an institution are necessarily implicit in the Act. However, according to the Office of the Commissioner, in practical terms, the absence of these express powers has meant that the Commissioner has sometimes had to rely on the goodwill of institutions to accomplish the legislative mandate. This has had a negative effect on the manner and timeliness in which the Commissioner has been able to perform the function of ensuring compliance with the Act.

The Committee believes that the addition of explicit review and investigatory powers is necessary to allow the Commissioner to effectively and efficiently perform the mandate of the legislation. The authority to do so must be clearly expressed to elicit the full co-operation of institutions with the Commissioner in ensuring compliance with the Act. However, the Committee is of the view that such power should not include the power to initiate investigations of access procedures or records of personal information in the absence of a specific complaint from the public about the institution. To provide otherwise would add to the cost of its operations and would significantly increase the power of the Office of the Commissioner when the need to do so has not been clearly established.

The Committee, therefore, recommends:

56. that section 46 be amended by adding the following:

46. The Commissioner may

(ia) upon receipt of a complaint, conduct a review of the access procedures of an institution or review of records of personal information in the custody or under the control of the institution for the purpose of ascertaining whether the institution is complying with the requirements of the Act.

(iia) upon receipt of a complaint, investigate an act or practice of the institution that may breach a privacy principle of this Act.

46a(1) For the purposes of the performance of the Commissioner's function under subsection 46(ia) or subsection 46(iia) of the Act, an employee of the Commissioner, authorized by the Commissioner for the purposes of this section may, at any reasonable time of the day, after notifying the head of the institution of his or her purpose, enter the premises occupied by the institution and inspect any records that are kept at those premises and any systems and procedures that are in place at those premises and that are relevant to the performance of the function.

(2) The head shall provide the authorized person with all reasonable facilities and assistance for the effective exercise of his or her function under subsection (1).

Practices in Contravention of the Act

Under section 46(b) the Commissioner has the authority, after hearing the head of an institution, to order the institution to "cease a collection practice and destroy collections of personal information that contravene the Act." This power is very limited given that one of the purposes of the Act is to "protect the privacy of individuals with respect to personal information about themselves held by institutions" and the fact that the Act regulates not only the collection but the use, retention, disclosure and disposal of personal information. The Commissioner's powers currently extend only to the collection of personal information.

Another shortcoming of the power under section 46(b) is that the Commissioner is only authorized to order a cessation of the practice, although the power to order a change in the practice would more effectively and efficiently bring the practice into compliance with the Act.

In all of these cases, the practice of the Commissioner is to enlist the support and co-operation of the alleged problem institution. Although the recommendations of the Commissioner for amending the faulty practices are generally adopted and implemented, the Commissioner must to some extent rely on the goodwill of these institutions to ensure compliance with the privacy provisions of the Act.

Other jurisdictions such as Quebec and British Columbia authorize the use of broad remedial powers to ensure compliance.

In its 1991 report, the Committee recommended the expansion of the Commissioner's powers to include broad remedial powers to redress improper privacy practices in institutions.

The Commissioner, therefore, recommends:

57. that section 46(b) of the Act be amended to state:

46. The Commissioner may, . . .

(b) after hearing the head, order an institution to

(i) change or cease a collection, use, retention, disclosure or disposal practice, and

(ii) destroy collections of personal information, that contravene this Act.

Commenting on Access and Privacy Implications

Section 46(a) authorizes the Commissioner to comment on privacy protection but not on access implications of proposed programs of institutions.

The Information and Privacy Commissioner suggests that as the government expands its use of electronic information technology for the collection, use, disclosure and retention of information, the need to address both access and privacy issues prior to the implementation of any new technology becomes increasingly important. Moreover, the power to comment on the access implications of proposed programs of institutions is necessary to fulfil the functions of promoting access and privacy protection.

Other jurisdictions which, like Ontario, have combined access and privacy protection into one legislative framework, have extended the powers of the Commissioner to cover both functions. For example, the British Columbia *Freedom of Information and Protection of Privacy Act* authorizes the Commissioner to:

> 42(1)(f) comment on the implications for access to information or for protection of proposed legislative schemes or programs of public bodies.

The Committee believes, that given the dual purposes of the Act to provide access and to protect personal privacy, the Commissioner should have the power to comment on the access implications of an institution's proposed legislative schemes or programs. However, this function can be accomplished without adding significantly to the cost of operations of the Commissioner by requiring institutions to bear the primary responsibility for considering the access and privacy implications of their own proposed schemes and programs. If required, the institution could then seek the Commissioner's comments.

Despite the fact that the failure by institutions to integrate access and privacy concerns at the outset in the design of their information systems may have a dramatic negative effect on the cost of retrieval of information subject to the legislation, there is currently no obligation on institutions to consider such implications.

In the Committee's view, the Act should be amended to establish mechanisms to ensure that institutions are responsible for considering the access and privacy implications of their programs and policies and to build these into the choice of technology and the design of systems to be used by public institutions. In addition, the Commissioner should have the power, when requested by an institution, to review and comment on the access and privacy implications of the institution's proposed programs and plans.

The Committee, therefore, recommends:

58. *that the Act be amended and the relevant regulations be introduced as follows:*

- *add a new subclause (c) as follows:*

  47. The Lieutenant Governor in Council may make regulations,

  (c) respecting the standards for privacy protection and access to records maintained electronically.

  The present sections 47(c) through (l) would become sections 47(d) through (m);

- *a regulation be introduced regarding access to government-held information as follows:*

  When records maintained electronically include items of information that would be available under the Act, an institution in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the retrieval and severance of available items in order to foster maximum public access;

- *a regulation be introduced requiring institutions to conduct a privacy impact assessment, as defined in the regulation, prior to the introduction of any computer information system and to request the Commissioner's comments on the access and privacy implications as may be required; and*

59. *that section 46(a) of the Act be amended to authorize the Commissioner, if asked by the institution, to offer comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of the institution.*

Record Linkages

Record linkages, also known as computer matching, data matching, computer cross-checking and a variety of other terms has been described as the computerized comparison of two or more automated systems of records or files. Although record linkages is not a new concept, computerization has made matching feasible on a more routine basis and on an extremely large scale. It is currently in practice in all Western European countries, the United States and the Canadian federal government. The development of increasingly sophisticated computer technology has created the ability to electronically link separate and remote databases so that the information contained in each is available to users simultaneously.

Supporters of record linkage practices argue that it is an effective way to deter fraud, waste, and abuse within government programs. One witness suggested that data matching programs should be standardized to prevent "double dipping" and other forms of fraud by those receiving government assistance.

Opponents believe that the benefits are overstated and unsubstantiated. They also argue that these initiatives are a violation of personal privacy in that personal information that is collected, used and disclosed for one purpose is then used through record linkages for a different purpose, without the knowledge or consent of the person to whom the information relates. While one of the purposes of the Act is to provide individuals with the right to protection of privacy of their

personal information, the Commissioner has no specific power to review or comment on these types of record linkage practices.

A recent nation-wide privacy survey sponsored by business and government organizations found that 9 out of 10 Canadians were at least moderately concerned about their privacy with 52 percent indicating that they were extremely concerned. Researchers concluded that Canadians believe that their personal privacy is under seige and that they want something done about it.

Other jurisdictions in Canada have recognized the policy implications of record linkage and have adopted specific regulatory measures to control the practice. Most recently, for example, British Columbia enacted a provision authorizing the Commissioner "to comment on the implication for protection of privacy of using or disclosing personal information for record linkage." Quebec legislation requires agencies to submit written agreements on record linkage programs to the Commission for an opinion. The agreement only comes into force if it receives a favourable opinion from the Commission.

In its 1991 review of the provincial Act, the Committee concluded that there was an "immediate need to determine the extent to which computer matching is being practised in this province and to establish a regulatory framework to ensure this practice does not impinge on individual privacy rights." The Committee recommended the establishment of a Task Force to "examine the practice of computer matching and its associated privacy concerns, and to report within six months with recommendations on an appropriate mechanism to control and monitor computer matching with the Ontario government."

Management Board Secretariat has since drafted a directive and implementation guidelines on enhancing privacy concerns in computer matching of personal information for institutions subject to the provincial Act. The purpose of the directive and guidelines is to establish mandatory administrative measures to protect personal privacy in computer matching. The directive attempts to balance

the privacy interests of individuals with the efficient use of computerized personal information.

The directive will require institutions governed by the provincial Act to conduct a computer matching assessment and to notify the Commissioner of computer matching initiatives prior to implementation. The Commissioner will then have the opportunity to comment on each initiative before it begins.

The Committee is aware that the provincial directives may not be necessary or completely adaptable to the smaller types of institutions to which the MFIPPA applies. Such institutions generally do not have personal information data bases of a size which would give rise to this type of matching.

The Committee, therefore, recommends:

60. *that Management Board Secretariat review the effectiveness of the new directive and guidelines on computer matching before further consideration is given to adapting them to the institutions covered by the Act.*

Parallel Access

The Act provides a general right of access to records in the custody or under the control of an institution. Other rights of access to government held records may also exist, giving the requester an alternative or parallel right of access. A party to litigation involving an institution will have rights of access to the institution's records under section 4 of the Act as well as "discovery" rights in the law suit. "Discovery" refers to the rights of production that each party to a litigation has to obtain facts and information about the case from the other parties to assist in the preparation for trial. Section 51(1) of the Act recognizes these other rights of access as being additional to the rights under the Act. The section provides:

> 51(1) This Act does not impose any limitation on the information otherwise available by law to a party to a litigation.

It was suggested to the Committee that the Act creates a procedural unfairness for institutions because, while a requester who is also a party to litigation with the institution has two avenues of access to the institution's records, the institution has only one route of access, that is, under court rules of discovery and production. The Act can thus be used by a requester/party litigant to supplement or circumvent the rules of production in the litigation.

Allowing a requester to exercise both rights of access, it was suggested, would seriously interfere with an institution's ability to prepare and present its case before the court or tribunal. It was proposed that the Act be amended to provide that where other rules of production apply to a requester, these rules should prevail over the Act; or alternatively, that institutions should be entitled to reciprocal disclosure of documents from the requester where the requester is seeking access to the institution's records for use before a court or tribunal.

Subsection 8(1)(f) of the Act provides that disclosure of a record may be refused where such disclosure could reasonably be expected to deprive a person of the right of a fair trial or impartial adjudication.

In Order 48 the Commissioner considered the issue of unfairness of parallel access in the context of the provincial Act. The issue focussed on whether subsection 14(1)(f) (the equivalent to MFIPPA section 8(1)(f)) would operate to preclude disclosure.

The Commissioner stated

> In my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the *Freedom of Information and Protection of Privacy Act, 1987* is unfair. The exemption provided by section 14(1)(f) should be considered in the context of the governing principles in the Act as outlined in section 1, and, to that effect . . . at this early stage in the development of the *Freedom of Information and Protection of*

> *Privacy Act, 1987* in Ontario, I am not prepared to reject the availability of the subsection 14(1)(f) exemption in all cases when the institution is involved in a civil law suit . . . . in my view, in order to demonstrate unfairness under subsection 14(1)(f), an institution must produce more evidence than the mere commencement of a legal action. Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they would have done so through use of specific wording to that effect . . .

Subsequently, in Order 192, an appeal involving a grievance before an administrative tribunal in which there was no process of discovery, the Commissioner stated that in order to rely on section 14(1)(f) the institution bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s).

Based on the limited evidence presented, the Committee is unable to make any meaningful assessment of the nature and extent of the harm that, it has been suggested, results from parallel rights of access. In addition, the Orders of the Commissioner indicate that relief from unfairness in such cases is available pursuant to section 8(1)(f).

The Committee is, therefore, unable to support the proposed amendment to the Act.

Exercising the Rights of a Deceased Person

Subsection 54(a) of the Act permits the personal representative of a deceased person to exercise the rights and powers conferred by the Act on the person if the exercise of the right is in respect of the administration of the deceased person's estate. The provision, in effect, allows the personal representative to "stand in the shoes" of the deceased person for the purposes of the Act. As such, the personal representative is entitled to have access to the deceased person's personal information, as of right.

It was brought to the Committee's attention that the Act is silent on the exercise of a deceased person's rights where there is no personal representative or where the right is not being exercised in respect of the administration of the estate. The limited circumstances described in subsection 54(a) are the only ones in which the deceased person's rights and powers under the Act can be exercised. In all other circumstances, the general provision of the Act apply.

Several problems with this legislative scheme have been identified. First, the term "personal representative" is not defined in the Act and is therefore, open to interpretation. The term, it was suggested, has received a restrictive, formalistic interpretation. In Order M-50, the Commissioner adopted the definition of "personal representative" from the *Estates Administration Act* as follows:

> personal representative means an executor, administrator or an administrator with the will annexed.

The Order requires production of the letters probate, letters of administration or ancillary letters probate under the seal of the court as a prerequisite for reliance on section 54(a). In the absence of such evidence, the section will not apply. Therefore, where appointment by the court is not necessary to administer the estate (it may be too small or the transfer of assets does not require the formality of court approval), there is no "personal representative" for the purposes of subsection 54(a).

Secondly, even where a "personal representative" has been appointed, but the reason for the request for access to personal information is not the administration of the deceased's estate, subsection 54(a) cannot be relied upon. Where for example, the family of a deceased person is concerned about the health care their family member received or the medical history of the deceased person because of the genetic pre-disposition to certain illnesses, section 54(a) cannot be used.

In all of these situations a family member, like any unrelated person, is considered to be a third party seeking access to another person's personal information and under the Act such information will only be disclosed if the disclosure does not constitute an unjustified invasion of personal privacy under section 14.

Until recently, access by a family member pursuant to section 14 was at least possible. Even if the information being sought fell within section 14(3) (that is information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy, such as "information relating to medical, psychiatric, psychological history, diagnosis, condition, treatment and evaluation) the factors in section 14(2) could be used to balance the access and privacy interests and in certain cases combine to rebut the presumption created by section 14(3). For example, Order M-50 involved a request by the mother of a deceased person for access to information about her deceased son's medical information. Although the mother was not his "personal representative" under section 54(a), she was allowed access to the information under section 14. The Commission read section 14(3) as having been rebutted by the factors in section 14(2).

Since Order M-50, the Divisional Court has ruled that this interpretation of the interrelationship of subsections 14(3) and 14(2) is incorrect. Once a presumption has been established under section 14(3) it can only be rebutted by the criteria set out in section 14(4) or by the "compelling public interest" override in section 16. The effect of this decision has been to close the avenue for relatives or other interested persons to obtain personal information about their deceased relatives or friends until thirty years after the deceased person's death when under the Act the information ceases to be personal information.

The Committee is concerned about this apparent gap in the legislation and believes that the Act should be amended to ensure wider access by family members and others who have a legitimate interest in the information.

The Committee therefore recommends:

61. *that subsection 54(a) be amended to ensure that family members and others with a legitimate interest are given greater access to the deceased person's personal information in a way that does not require the formality of court appointment and that is not limited to situations involving administration of the deceased person's estate.*

Exercise of the Rights of Persons Under Age Sixteen

Introduction

The Act gives to every individual certain rights of access and privacy. However, where the individual is under 16 years of age, the Act allows the parent (or other person with lawful custody) to exercise the child's statutory rights.

According to a number of school boards and municipalities who appeared before the Committee, there continues to be confusion about the effect of section 54(c) in relation to parental access provisions to a student's record under the *Education Act* and, in the context of the provision of health services by public health facilities, with the principle of doctor-patient confidentiality.

School Records

The *Education Act* provides that where a student is under 18 years of age the parent (or other lawful guardian) is entitled to have access to the student record without the child's consent. In addition, regulations to the Act authorize the school principal to inform the parents of a pupil who is less than 18 years of age of any violation of school rules by the pupil.

Initially, the age differences under the Act and under the *Education Act* raised concerns that section 54(c) would operate to prohibit disclosure of a student's record to parents if the student was over 16 years of age and that the consent of pupils between the ages of 16 and 18 would be required before any information could be released to the parents.

In the years since the Act came into force, there has been greater clarification of this issue, due in large part to the advisory and education assistance of the Management Board Secretariat. However, some confusion and uncertainty persists.

According to the Management Board Secretariat, section 54(c) does not interfere with the parental access rights under the *Education Act*, because section 32(e) of MFIPPA provides that an institution may disclose personal information for the purpose of complying with an Act of the Legislature. Therefore, the authority in the *Education Act* and its regulations is not qualified or reduced by subsection 54(c) of the MFIPPA. Subsection 54(c) merely entitles the parent of a child under the age of sixteen to exercise the child's rights and powers on behalf of the child for any purpose under MFIPPA. A child may also exercise these powers in his or her own right (assuming the child has the maturity to do so).

Based on the submissions received, the Committee is satisfied that there is a growing awareness of the relationship between section 54(c) of the Act and the parental access provisions of the *Education Act*.

The Committee considered a related issue concerning access to a student's school attendance record by a social assistance agency where the student is receiving social assistance and school attendance is a condition of the receipt of welfare. In the Committee's view, the social assistance agency should have direct access to the student's school attendance record in these limited circumstances. A student should not be able to frustrate the means of verifying attendance and thus of eligibility to receive social assistance by denying the agency's request for access. An amendment to the Act or to other appropriate legislation such as the *Education Act* should be made to ensure that social assistance agencies have the means to verify school attendance.

The Committee, therefore, recommends:

62. *that Management Board Secretariat continue to assist institutions to ensure greater understanding of these statutory provisions; and*

63. *that an amendment be made to the Act or other appropriate legislation to ensure that where a student is receiving social assistance and school attendance is a condition for ongoing entitlement, the social assistance agency has the right of access to the student's school attendance record, without the student's consent, to verify that the condition is being met.*

Doctor-Patient Confidentiality

A more pressing issue is that section 54(c) conflicts with the duty of doctor-patient confidentiality. The concern arises in the context of the provision of medical services to individuals who are under age 16 by public health clinics, which are covered by the Act. Such facilities provide a wide range of medical services to the public including to youth under age 16 who in some instances do not want their parents to know that they have sought these services. The conflict does not arise in the context of medical services that are provided privately by a physician, clinic or in public hospitals as none of these bodies is covered by the legislation.

Section 54(c) allows the parent of a child who is under 16 years of age, to "stand in the child's shoes" and request access to the child's medical information from the health care practitioner. A conflict is thus created for physicians and medical staff who are professionally bound to maintain doctor-patient confidentiality with the child and yet have a statutory duty to comply with the Act including section 54(c).

Although this issue has not been dealt with directly on appeal, the Commissioner recently considered the limits of section 66(c), the provincial Act equivalent of section 54(c), in Order P-673. The case involved a request by the father of a 14 year old boy for access to records held by the Ministry of Community and Social Service that contained personal information about his son. The records at issue related to a custody and child protection proceedings involving the mother and the father. The Commissioner acknowledged that the right of every individual to have

access to his or her own personal information in the custody or control of an institution may, in the circumstances set out in section 66(c), be exercised by another party.

According to the Commissioner, this right is not absolute. A parent may only exercise the child's right of access *on behalf of the child* and not for any collateral purpose. In this case, the Commissioner found that the parent, while acting in good faith, sought access to the records to meet his personal objectives and not those of the child.

The Committee believes that the Commissioner's approach to the interpretation of s. 66(c) recognizes the potentially different interests of parent and child and respects the child's privacy interests. In the Committee's view, the highly sensitive nature of medical information, the need to provide certainty for health care practitioners, and the need to ensure that youth seek necessary medical services warrant an amendment to section 54(c) which incorporates the limits set out in the Order.

The Committee, therefore, recommends:

64. that section 54(c) be amended as follows:

> *54. Any right or power conferred on an individual by this Act may be exercised,*
>
> *(c) where the individual is less than sixteen years of age, by a person who has lawful custody of the individual if the exercise of the right or power is in the best interests of the individual.*

ROUTINE DISCLOSURE/ACTIVE DISSEMINATION

The Act permits the disclosure of information in the absence of a formal request. Section 50(1) provides that if access is not otherwise prohibited by the Act nothing prevents a head from giving access to information in the absence of a request. In

addition, section 50(2) states that the Act shall not be applied to preclude access to general records to which the public was allowed by a custom or practice that predated the legislation. Together, these sections permit the disclosure of information outside the formal access process created by the Act. Therefore, while not specifically requiring routine disclosure, the Act does allow for it.

Several witnesses, including the Information and Privacy Commissioner, suggested that routine disclosure of general information should be actively encouraged in the Act as a way to reduce administrative costs and to further the purposes of the Act. Processing requests and appeals within short statutory time limits is more expensive and time consuming than providing routine access to pre-identified categories of information. The cost of compliance with the Act for many institutions, particularly smaller institutions, was a cause of concern to many witnesses. The elimination of the largely bureaucratic tasks of searching for and assessing information within the 30 day time limit by pre-classifying some records as subject to routine disclosure will make it easier for staff to provide the information more efficiently and with less bureaucracy.

The issue of routine disclosure and active dissemination was discussed in the Committee's 1991 report. Consistent with the principle of more open government, the Committee recommended

> that institutions be required to publish, in advance of any request being made, and on a periodic basis, a list of all studies and policy documents that are available to the public.

In these hearings a number of witnesses responded to this recommendation and urged the Committee not to support its application to institutions covered by the municipal Act. Compliance with this recommendation, it was suggested, would impose an additional and costly burden on institutions.

Another witness proposed that the Commissioner should be given responsibility for compiling the catalogue of records which could be classified as being subject

to routine disclosure. The rationale for this suggestion is that many institutions at the local level are governed by the same statutory authorities to create, compile and collect the same types of records. The designation by a central body such as the Commissioner of some of these records as subject to routine disclosure could be done on a province-wide basis and would be time and cost saving for the individual institutions.

The Committee notes that section 25 of the Act already requires the head of an institution to make available for inspection certain information including a description of the institution and the types of information it holds. It would be possible to simply add to this section the records or classes of records that the institution makes available through routine disclosure.

The Committee believes routine disclosure could be assisted by the advances in electronic information technology which are making information increasingly accessible in a variety of formats. Where operationally possible, making such information available through a centrally located database which could be searched directly by the public would enhance public access while saving institutions staff time and money in not having to re-direct its resources to respond to requests within the time limits.

The Committee is aware that the Information and Privacy Commissioner and Management Board Secretariat are currently developing directives and guidelines for the routine disclosure of information by institutions. However, the Committee believes that routine disclosure of government held information should be actively encouraged under the legislation by including in the regulation-making power the authority to designate certain records or classes of records that should be routinely disclosed by any institution which has such records in its custody or under its control on a periodic basis and in the absence of any request under the Act. In order to ensure that only those records which would not be subject to exemptions under the Act are designated as records which must be routinely disclosed, the regulation should only be made on the advice of and after consultations with the

affected institutions and other interested parties. The advantage to having records designated for routine disclosure by a centralized body is that institutions are relieved of having to examine each record and this will result in operational savings to institutions and the public will not have to incur any unnecessary delay or cost in accessing the records. It will also have the effect of standardizing decisions about access and reducing the number of disparate interpretations and applications of the legislation among institutions.

The Committee, therefore, recommends:

65. *that section 47 of the Act be amended to include the following provision:*

47. The Lieutenant Governor in Council may make regulations,

designating classes of records that are in the custody or under the control of institutions which are to be routinely disclosed to the public, on a periodic basis, in the absence of any request being made under the Act;

66. *that regulations designating records as subject to routine disclosure should only be made on the advice and after consultations with the affected institutions and other interested parties; and*

67. *that section 25 of the Act (Information available for inspection) be amended to include records or classes of records that are designated by regulation to be subject to routine disclosure.*

FRIVOLOUS AND VEXATIOUS REQUESTS

The issue of nuisance requests was raised repeatedly before the Committee. Although no one was able to define the term, the effect was clear. Nuisance requests tax the resources of institutions, particularly of smaller institutions, cause delay and result in costs which, in most instances, are borne by the individual institutions and ultimately, by the taxpayer. Many witnesses, principally the institutions that have to respond to such requests, urged the Committee to

recommend an amendment to the Act to permit the "weeding-out" of such requests.

Witnesses gave many examples of the kinds of requests that they considered to be nuisance requests; however, no single or all-inclusive definition of what constitutes a "frivolous or vexatious" request emerged from the evidence. This fact underscores the extreme difficulty of formulating a definition which will satisfy the different perspectives of institutions and requesters.

The following were cited as examples of nuisance requests:

- splitting a bulk request into many smaller requests — a requester will sometimes split one request for a large volume of information into many more smaller requests; doing so, allows the requester to increase the amount of free search time that the institution must provide under the Act, thereby reducing the fees that the requester might otherwise have to pay. Under section 45 of the Act, a requester is entitled to 2 hours of search time free of charge for each request. The institution therefore must absorb the additional cost of processing what, in their view, is one request. According to many institutions, this creates a substantial hardship, particularly for smaller institutions with limited staffing resources. Having to divert staff from performing the usual functions of the institution to processing the requests within the 30 day time limit, it was suggested, can virtually shut down the institution;

- no obligation to proceed with request — despite having to process the request and send a fee estimate, there is no obligation on the requester to continue with the request. If the requester drops the request, the institution cannot recover any of its costs;

- repetitive requests — often for the same information sent simultaneously to many institutions in the hope that they will be responded to slightly differently and reveal additional or different information;

- requests for information that the requester already possesses; and

- requests made for improper purposes — it has been suggested that some requests are obviously made for the purpose of harassing or intimidating the institution or to "bog down" the institution. One witness cited the case of a requester who publicly announced his intention to tie-up the government with a flood of requests. This person claimed to have cost the

various levels of government over 3 million dollars in processing requests under the Acts.

- abandoned requests - requesters sometimes abandon a request after receiving the fee estimate or simply fail to collect the requested records.

The Committee recognizes that there may be valid reasons from the perspective of the requester for each of the above requests. This is not to say that nuisance requests do not exist or that they do not impose a substantial burden on institutions; rather, it emphasizes the obstacles to developing one definition to apply in all circumstances.

However, the issue of nuisance requests has been addressed by other jurisdictions. Some witnesses urged the Committee to adopt a provision similar to section 43 of the British Columbia *Freedom of Information and Protection of Privacy Act* which provides:

> 43. If the head of a public body asks, the Commissioner may authorize the public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.

Quebec has also enacted a provision which permits the Commission to authorize a public body to disregard requests that are obviously improper because of their repetitious or systematic nature or if, in the opinion of the Commissioner, the requests are made for purposes not in accordance with the objects of the Act.

Other Ontario statutes have provisions to deal with frivolous and vexatious requests. For example, the *Courts of Justice Act* allows the courts to dismiss a law suit found to be frivolous or vexatious and to order that no further proceeding may be commenced by that person in any court except with leave of the court. Similarly, the Ombudsman, under the *Ombudsman Act* and the Ontario Human Rights Commission, under the *Human Rights Code* are authorized to refuse to deal with complaints which they deem to be trivial, frivolous, vexatious or made in bad faith.

In the 1991 review of the provincial Act, the Committee concluded

> [T]he problem of nuisance requests has now reached such dimensions as to pose a significant threat to the ability of government institutions to fulfil their responsibilities under the Act. Nuisance requests consume the time and resources of institutions, which in turn costs taxpayers money. While the Committee is mindful of the importance of the general right to access established under the Act, this right must be balanced against the inordinate costs imposed on the system by a few extreme cases. The Committee believes that a nuisance request provision, applied only in the most extreme cases, would not substantively affect the way in which access to government records is currently provided.

The Committee recommended that the Act be amended to include a mechanism to allow the head of an institution to disregard a request if the request is frivolous or vexatious or amounts to an abuse of the right of access. The decision of the head would be subject to appeal to the Commissioner.

Based on the evidence presented, it is clear that nuisance requests interfere with the operations of institutions and the Office of the Commissioner, tax the financial and staff resources of these public bodies and ultimately add significantly to the cost to the taxpayer of the administration of the Act. Although few in number, the financial and operational impact of frivolous and vexatious requests is significant.

However, recognizing that different perspectives make a definition of "frivolous and vexatious" difficult to formulate, and in order to safeguard the right of access guaranteed by section 4 of the Act, the Committee believes that the determination of whether any particular request for access is "frivolous or vexatious" should not be left to the head of the institution. Instead, it should be made by the Commissioner. This will lead to greater uniformity in the determination of such cases and will appropriately put the onus on the institution to satisfy the Commissioner that the request is frivolous or vexatious in the circumstances.

The Committee, therefore, recommends:

68. that the following provision be included in the Act:

- *the head of an institution may apply to the Commissioner for an order authorizing the institution to disregard the request for access on the basis that the request is frivolous or vexatious;*

- *the application shall be made on written notice to the person seeking access within seven days after receiving the request; and*

- *the notice shall set out the reasons for the head's application, the date of the application and shall identify the requests affected by their date.*

Request Fee

Another suggestion for discouraging nuisance requests was the imposition of a nominal filing fee for each request. It was noted that the federal *Access to Information Act*, for example, imposes a $5 application fee. A filing fee in the range of $30 is levied by the courts and the Ontario Municipal Board has a filing fee of $125.

However, the Information and Privacy Commissioner believes that even a nominal filing fee would be a barrier to access. Instead, a complete change in institutional thinking is required so that government begins to recognize that it does not own but is simply the custodian of the information that it holds.

In the Committee's view, a request fee of $5 to $10 would act as a disincentive to capricious requests without being significant enough to be prohibitive. The imposition of such a fee would also help to address the problem of splitting one request into a series of requests so as to take advantage of the two hour free search time for each request provided under the Act. To ensure that the fee is not a barrier and will not be used by institutions to create access barriers, the Committee believes that if the cost of reproducing the record is less than the application fee, the institution should only be able to charge the lesser amount.

The Committee also wants to ensure that the request fee is not used simply as a revenue generating mechanism. Therefore, there should be no fee chargeable on records that are or should be subject to routine disclosure. This restriction on the levying of the fee supports the principle of routine disclosure and active dissemination that the Committee believes should be actively encouraged in the Act.

The Committee, therefore, recommends:

69. *that the Act and regulations be amended to require the payment of a nominal fee of $5 for each request for access, except for a request for access to records which are designated by the Act or regulations to be subject to routine disclosure; and*

70. *that, if the cost of reproduction of the record is less than the request fee, the institution be permitted to charge only the lesser amount.*

Appeal Process

Appeal Fee

A related concern is the effect on the appeal process of capricious and unnecessary appeals. The Committee heard that the filing of such appeals by a small number of users contributes significantly to the delay and costs of appeals under the Act. Currently, there is no fee for the filing of an appeal and no mechanism to discourage appeals that are clearly frivolous or to prevent them from tying up the appeal process. There is no financial disincentive to launching an appeal and no incentive to mediate or settle issues prior to the hearing stage of the appeal.

In the Committee's view, the imposition of a nominal appeal filing fee, similar to that imposed by the civil courts, would discourage the unconsidered and automatic filing of an appeal and cause the parties to re-think the need for an appeal. The amount, however, should not be so great as create a barrier to the appeal process. The Committee believes that a fee of $25 for each appeal would satisfy both these conditions.

The possibility of permitting a waiver of the fee in hardship cases was considered but abandoned as being impractical because the cost of conducting a hearing on the issue of whether the fee ought to be waived, with the further possibility of an appeal from that decision, would greatly outweigh the cost of the application fee.

The Committee, therefore, recommends:

71. that the Act be amended to provide that an appeal is subject to a filing fee of $25.

Awarding of Costs on Appeal

Currently, the Commissioner lacks any authority to award costs on appeal. It was suggested, that by legislating such authority, parties would be encouraged to mediate and settle the issues to avoid the possibility of an order of costs being made against them. The risk of having to pay costs would also cut down on the filing of capricious and frivolous appeals.

The Commissioner, however, cautioned against amending the Act to include the power to award costs because of the concern that it would change the nature of how the Commission operates, which is to attempt as far as possible to mediate a resolution to the dispute. The power to award costs would make the whole process more adversarial, requiring greater formality, increased involvement of lawyers and result in increased time and costs.

The Committee is concerned that the appeal process not be used as a tool to abuse the rights and powers provided by the Act either by the filing of nuisance and unnecessary appeals by those who seek to clog the process or tie up the resources of institutions or by those who would seek to frustrate or delay access to information. For this reason, the Committee believes that the Commissioner should have the authority to deal with unreasonable conduct by awarding costs of the appeal against any party who, in the Commissioner's opinion, has unreasonably and without good cause pursued the appeal or failed to comply with

the Act. This limitation on the authority to award costs will ensure that legitimate appeals will not be penalized while those who abuse the appeal process will risk having to pay costs to the other party. The Committee believes that this limited authority will enable the Commissioner to address frivolous appeals while preserving the current process of encouraging reasonable resolution of the issues through mediation.

The Committee, therefore, recommends:

72. *that the Act be amended to give the Information and Privacy Commissioner the authority to award costs of the appeal against any party, who in the opinion of the Commissioner, has unreasonably and without good cause pursued the appeal or failed to comply with the Act.*

FEES

Fees and the costs of administering the Act were the issues about which the Committee received the greatest number of submissions. Institutions, objected to the high, largely unrecoverable costs of administering the Act and the absence of any mechanism to deter capricious requests; others, primarily non-institutional users, argued that a "cost recovery" philosophy of fees would create a barrier to access depriving many of the opportunity to use the legislation.

Section 45 of the Act currently provides that, if no provision is made for a charge or fee under any other Act, a head shall require the requester to pay

(a) every hour of manual search time in excess of two hours to locate the record;

(b) the costs of preparing the record for disclosure;

(c) computer and other costs incurred in locating, retrieving, process and copying a record; and

(d) shipping costs.

The actual rates that can be charged are set by regulation. Currently, an institution may charge:

- a search fee of $7.50 per quarter hour for every hour of manual search required to locate a record in excess of 2 hours;
- 20 cents per page for photocopying;
- $7.50 per quarter hour for preparation of a record for disclosure; and
- $15.00 per quarter hour for developing a computer program or other method of producing a record for a machine readable record.

There is no charge for review, consultation or decision-making time involved in processing the request. Before providing access to a record, the head is required to give the requester a reasonable estimate of any fee in excess of $25.00. No fees are chargeable for access to one's own personal information.

Subsection 45(4) requires the head to waive the payment of the fee, or any part of it, if in the head's opinion, it is fair and equitable to do so having regard to:

> (a) the extent to which the actual cost of processing, collecting and copying the record differs from the fees that can be charged under the Act;
>
> (b) whether any fee payment will cause a financial hardship for the requester;
>
> (c) whether the dissemination of a record will benefit public health or safety;
>
> (d) other matters prescribed by regulation such as whether access was granted and if the fee is less than $5 whether the amount is too small to justify requiring payment.

Anecdotal evidence was presented by several institutions which supported claims of a significant shortfall between the actual costs of processing requests and the

fees permitted under the Act. Some institutions urged the Committee to establish fees that reflect the actual processing costs including: updating the rates set out in the regulation to the Act; allowing institutions to charge for reviewing the record to determine if any of the exemptions apply and whether any part of the record can be severed, for preparing the decision letter and for processing a request that is subsequently transferred to an institution with a greater interest; and for hiring additional or replacement staff to process requests within the 30 day time limit.

The Committee, however, has received insufficient information on the widespread effect on institutions and the public of the current fee structure. In particular, no information was presented on the amount of the fees collected by institutions relative to the actual costs incurred, or on the number of requesters who may have been unable to use the Act because of high fees. The Committee, therefore, is unable to assess the effect of the current level of fees on the use of the Act as compared to the use if fees were increased to ensure cost recovery for institutions.

The current economic climate has brought the issue of fees, including costs of administering and using the Act and concerns about the prudent expenditure of public funds into sharp focus. The Committee believes that it is therefore even more important to find ways of reducing overall costs of administration of the Act while not reducing access through the imposition of significantly greater fees. Some ways of doing this have been discussed elsewhere in this report such as measures to reduce the number of frivolous and vexatious requests, the imposition of nominal request and appeal filing fees and the designation of certain records as being subject to routine disclosure and available for inspection in the absence of a request under the Act. The Committee has also considered several other more specific proposals for reforming the fee structure of the Act.

Personal Information

Under subsection 45(2) fees cannot be charged in respect of a request for one's own personal information. Some institutions suggested that requests for personal

information should be subject to the same fees as for general records. Others proposed that only those requests for personal information which require searching through general records, that is, where the personal information is not stored as such, should be subject to the fees charged to general records. Another suggestion was that the institution should be able to charge for personal information that the requester already possesses.

In 1991, the Committee recommended that requests for personal information involving more than two hours search time should be subject to the same fees that are applicable to requests for general files. Requests for personal information that do not require more than two hours of manual search should continue to be completely free of charge.

The Committee believes that requests for personal information should continue to free of any charge. However, because of the currently unlimited search time that is available for personal information searches and the need to reduce frivolous requests, the Committee is of the view that where a request for personal information is repetitious, that is, where the requester has already been given access to the information by the institution, any further request for the same information should be subject to fees which reflect the full costs of reproduction.

The Committee, therefore, recommends:

73. that section 45(2) of the Act be amended to provide:

> *45(2) Despite subsection (1), a head shall not require an individual to pay a fee for access to his or her own personal information, <u>except where the information has already been provided to the requester, the head shall require the individual to pay the full actual costs of reproduction for any subsequent request for the same personal information.</u>*

Commercial Purposes

The Act does not require requesters to identify the purpose for which the request is being made. As a result, information to be used for commercial purposes can be obtained under the Act and is subsidized by taxpayers because the fee structure does not reflect the actual cost of processing and producing the information. It been suggested that requests for information to be used for commercial purposes should be subject to fees which reflect the actual cost to the institution of processing the request rather than the limited processing fees permitted under the Act. In its 1991 report the Committee accepted this proposal, stating:

> . . . [T]hat taxpayers should not subsidize requests for information that is intended to be used for commercial purposes; rather, those who make such requests should be required to pay the full costs associated with the request.

Because there is currently no provision in the legislation requiring the disclosure of the purpose of the request, some means must be established to identify these types of requests. One option is to require the requester to sign an agreement similar to that required under section 14 where personal information is disclosed for research purposes. Failure to execute the document would mean that the requester must pay the actual costs of processing the request.

Another option, used in freedom of information schemes in the United States, is to create a statutory presumption that each request for access is for information to be used for commercial purposes and therefore subject to full fees. Certain types of requests are exempt such as requests made by elected officials, government agencies, the media and others where the request is in the public interest. To be relieved of the full fee charge, the requester must show that the request is not for commercial purposes.

In the Committee's view, this model has the advantage of administrative simplicity for institutions and users. In addition, the onus of showing that the request is not

for commercial purposes is fairly and appropriately on the party who is in the best position of proving the purpose of the request.

The Committee therefore recommends:

74. *that the Act be amended to provide that every request for information will be presumed to be a request for commercial purposes and as such will be subject to the actual costs incurred in reproducing the requested record. In order to avoid the fees the requester would have to show that the request is not for commercial purposes. Regulations should designate certain classes of requests and requesters that will be exempt from the presumption including, for example, requests by elected officials; government agencies, boards and commissions; the media and others where the request is in the public interest.*

Calculation of Fees

The Committee believes that section 45 needs to be clarified in two ways, both of which the Committee recommended in respect of the equivalent section in the provincial Act in its 1991 report. First, the wording of subsection 45(1) is not clear as to whether the costs listed in this section are the only costs that a head can require a requester to pay. Such an amendment would help to ensure that he fee structure is applied consistently by all institutions and that fees are not used as a means to deter requests for access to records.

Second, subsections 45(1)(a) and (c) authorize the charging of a fee in respect of searching, processing and copying of "a record." It is not clear from this wording that the reference is to the record which is the subject of the request. If the wording was changed from "a record" to "the record," it would make clear that a person can only be required to pay fees in respect of the record requested and not some other record.

The Committee, therefore, recommends:

75. *that subsection 45(1) be amended as follows:*

45(1) Where no provision is made for a charge or fee under any other Act, a head shall require the person who makes the request for access to a record to pay costs no greater than the following, . . . ; and

76. *that subsection 45(1) be amended as follows:*

(a) a search charge for every hour of manual search required in excess of two hours to locate the record;

. . .

(c) computer and other costs incurred in locating, retrieving, processing and copying the record;

Appealing Fee Waiver Decisions

The terminology used in section 45(5) is inconsistent with that used with similar provisions elsewhere in the Act. Sections 21(8)(a), 22(1)(b), 22(2)(d) and 22(3) all use the words "may appeal the decision to the Commissioner" or "may appeal to the Commissioner for a review of the decision." Subsection 45(5) uses the words "may ask the Commissioner to review."

The Committee believes that the subsection should be amended to accord with the wording in these other sections to eliminate any confusion that may arise with respect to rights and powers that flow from "a review" as opposed to "an appeal."

The Committee, therefore, recommends:

77. *that subsection 45(5) be amended as follows:*

45(5) A person who is required to pay a fee under subsection (1) may appeal to the Commissioner for a review of the amount of the fee or the head's decision not to waive the fee.

Notice of the Right to Appeal Fee Waiver Decisions

The Act currently provides the right to appeal a head's decision about the amount of a fee or whether the fee will be waived. However, the Act does not require the

institution to inform the requester of this right. The Committee believes that without such notification the requester may be unaware of this right, making it ineffective.

The Committee, therefore, recommends:

78. *that section 45 of the Act be amended to require institutions to provide requesters with a notice of the right to appeal the amount of the fee or a refusal of fee waiver.*

MISCELLANEOUS

Archival Records

Witnesses have identified several problems with the application of the Act to archival records which have created barriers to access to records held in government archives.

The first issue involves the need to review archival records on an ongoing basis to determine whether an exemption applies. Currently, only two of the Act's exemptions are time-limited, which means that after a specific period they are no longer subject to the exemption and can be disclosed. Without such time limits, archival records must be reviewed in perpetuity to determine whether an exemption applies, no matter how long the record has been in the custody of the archive and despite the fact that information loses its sensitivity over time.

The Information and Privacy Commissioner has suggested that the Act be amended to specify a time period, say 20 years after the record is created, following which general records (records not containing personal information) that are in the custody of a government archive could be made available to the public. This same proposal was made by the Archivist of Ontario and accepted by the Committee in its 1991 Report on the provincial Act.

The Committee believes that the proposal should also be adopted in respect of the municipal Act. It will simplify the administration of the Act for local government archivists and will reduce costs. The Committee however has made recommendations elsewhere in this report to reduce the time limits on exemptions to 15 years. If these recommendations are accepted and time restrictions of less than 20 years are adopted for the exemptions, then provisions will have to be included in the Act to ensure that records transferred to government archives will be subject to the same time limits that are applicable to the exemptions. In other words, institutions should not be able to extend the exemption period for a record simply by transferring the record to government archives.

Another problem that arises from the application of the Act to archival records relates to the protection of personal information. Subsection 2(2) of the Act provides that information ceases to be personal information only after the subject of the record has been dead for thirty or more years. In many cases it is difficult to establish the date of death of the person who is the subject of the record. Although the Act makes provision for access to personal information for research purposes under section 14(1)(e), difficulties still arise.

The proposal that was accepted by the Committee in the 1991 review to deal with this issue was that archival records containing personal information should be available to the public a specified period after the creation of the record. The recommended period was 100 years, a period considered sufficient to ensure that the disclosure will not infringe on personal privacy. In its Report, the Committee noted that

> By linking the sensitivity of information to the age of the record, rather than to the date of death of the person to whom the information relates, it will be easier for the Archivist to make decisions about the release of a record.

The final archival concern relates to section 52(2) which provides:

> 52(2) This Act does not apply to records placed in the archives of an institution by or on behalf of a person or organization other than the institution.

The section appears to limit the application of the Act to the records of the institution in whose archives the records are held; records transferred from one institution to the archives of another institution are not subject to the Act.

There is a significant difference in wording between section 52(2) of the Act and its equivalent section in the provincial Act. FIPPA section 65(1) provides:

> 65(1) This Act does not apply to records placed in the Archives of Ontario by or on behalf of a person or organization other than an institution.

This difference in wording means that under the municipal Act archival records received from other institutions are not covered by the legislation whereas under the provincial Act records received from any institution are covered by the legislation.

The Committee believes that this problem can be rectified by amending the wording of section 52(2) to accord with FIPPA section 65(1). This change will ensure that the Act is not used to subvert access to government held records.

The Committee, therefore, recommends

79. that the Act be amended to provide that

> *(a) all general records that have been transferred to a government institution's archives be made available to the public after a specified period of time after the creation of the record and this period should not exceed 20 years.*
>
> *(b) all records containing personal information that have been transferred to a government institution's archives be made available to the public 100 years after the creation of the record.*

In the event time restrictions of less than 20 years are adopted for the exemptions to the Act, the Act should ensure that records transferred to the archives of a government institution are released in accordance with the time restrictions applicable to the exemption; and

80. *that subsection 52(2) of the Act be amended as follows:*

52(2) This Act does not apply to records placed in the archives of an institution by or on behalf of a person or organization other than an institution.

Test Questions

Standardized Psychological and Education-Related Tests

Several witnesses, including the College of Psychologists and the professional associations representing psychologists in the province, expressed concern that the Act does not adequately protect from disclosure standardized psychological tests, one of the necessary tools of psychological assessment. The Committee was advised that the public disclosure of the questions or answers of such tests will undermine the validity, objectivity and fairness of the assessment technique.

Standardized psychological tests such as intelligence and personality tests are developed through years of rigorous research, sampling and standardization to ensure that the tests are valid, reliable and fair. Psychologists and other qualified professionals throughout North America use the same standardized tests in many different settings for a variety of purposes: for example, in mental health facilities, corrections, community and social services, schools, businesses, and industry. Professional standards of practice and ethical conduct require psychologists to maintain the secrecy of the tests.

Two exemptions in the Act are relevant to the issue of disclosure of standardized psychological tests. Section 10 exempts from disclosure a record that reveals the trade secrets, or scientific, technical, commercial or financial information of a third party which has been supplied to the institution in confidence if the disclosure could reasonably be expected to prejudice significantly the third party's

competitive position. In addition, section 11(h) protects from disclosure questions that are to be used in an examination or test for an educational purpose.

The concern of the College and the psychological associations is that these provisions have been interpreted so narrowly that there is uncertainty about whether the standardized test questions including test materials such as test manuals, the correct answers, and examiners' guides which could lead by inference to the disclosure of the test questions are protected from disclosure. In Order M-91 the Commissioner ruled that a student's answers and scores and the examiner's comments on an intelligence test must be disclosed because these parts of the test are not "questions that are to be used in an examination or test." The Commissioner also found that the student's answers and the examiner's comments were not trade secrets and were not protected under section 10(1).

In Order P-461, the Commissioner ruled that the correct answers to test questions were accessible under section 18(h) of the provincial Act (the equivalent to section 11(h) of the municipal Act). The section protected only the test questions, not the answers.

In Order P-422, the requester sought the final examination questions that had been administered in a college course. The College objected to releasing the information on the basis that the questions were part of a "test bank" of questions, some or all of which would be used in the future on subsequent examinations. The Commissioner rejected this argument and ordered disclosure.

The Committee's principal objection to the suggestion that a specific exemption should be included in the Act to protect standardized psychological tests from disclosure is that it would have the effect of creating a closed system in which these tests are designed, administered, interpreted and evaluated by only one group and are not subject to challenge by anyone outside of that group. The results of these tests may have profound implications for the person being tested including whether the person is considered to be "gifted" or "learning disabled,"

or whether the person is considered to have a "personality disorder." These determinations in turn have potentially serious and lasting implications for whether a person is considered to be suitable for certain educational streams, or positions in industry or business, or employment. Persons taking the tests have an interest in their validity, accuracy and fairness. Those who may suffer the consequences of these implications have an interest in "facing their accuser" and in being able to challenge the tests on whatever basis they believe appropriate.

Employment-related testing presents the same concerns. Section 11, it was suggested, does not adequately protect such tests from disclosure. Section 11(h) in particular, was criticised as being too narrowly worded in that it applies only to test questions which are for an educational purpose. Employment related tests used to evaluate a candidate's job related skills or knowledge are not covered under this subsection. In addition, two recent Orders involving section 18, the provincial Act equivalent of section 11, ruled that such tests are also not exempt from disclosure under sections 18 (c), (d), (f) and (g). In each case, the job competition questions and answers were ordered to be disclosed.

The public disclosure of interview and other employment-related tests could result in a biased and unfair interview and evaluation process. It is in the interests of fairness to other candidates and employees that such tests are standardized by using the same questions so that the best qualified person may be objectively evaluated and selected. Moreover, it is far more cost-effective to ensure that the test questions and answers can be used again in future similar evaluations and competitions.

At the same time, the implications of such tests demand that the person who may be adversely affected by the results should have the opportunity to challenge the tests. Access to the test questions and answers is necessary to this process.

The Committee believes that significant concerns have been raised about the application of the Act to standardized tests in both the psychological assessment

and employment contexts. The competing interests are marked by compelling arguments on both sides. However, based on the evidence presented, the Committee is unable to formulate a solution to the conflict between maintaining the integrity of such tests and ensuring appropriate access to challenge the tests and procedures. Further study of these issues is required before a recommendation can be made.

Architectural Plans

Architectural drawings and building plans are routinely collected by municipal authorities for the purposes of planning and development projects. These plans are accessible under the Act as general records, except where specific exemptions may apply. It was suggested to the Committee that the accessibility of these plans under the Act creates an unfairness for the architect and owner because the plans and drawings can be converted to the use of anyone who makes the request for access with no compensation to the architect or the owner.

There is no provision in the Act that specifically addresses this concern, however the section 10 exemption for third party information may apply in certain cases. In addition, such plans and drawings are already protected from infringement by the federal *Copyright Act*. In Order M-29, the Information and Privacy Commissioner cited sections 27(1), (2)(i) and (j) of the *Copyright Act* to support the ruling that disclosure under the Act does not constitute an infringement of the federal Act. Section 27 of the *Copyright Act* provides:

> 27. (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything that, by this Act, only the owner of the copyright has the right to do.
>
> . . .
>
> (2) The following Acts do not constitute an infringement of copyright:

> (i) the disclosure, pursuant to the *Access to Information Act*, of a record within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like material; and
>
> (j) the disclosure, pursuant to the Privacy Act, of personal information within the meaning of that Act, or the disclosure, pursuant to ny like Act of the legislature of a province of like information.

Accordingly, an institution may not refuse access to a record in its custody or control solely on the basis of a copyright claim.

The Committee believes that although exemptions under the Act against disclosure of third party information and the protection and remedies available under the federal Copyright Act do provide protection for the commercial interests in architectural and building plans, the privacy interests may not be adequately protected by these provisions. For example, access to the interior layouts of buildings contained in these plans could be used for unlawful activities including commercial espionage and threats to personal security.

The Committee, therefore, recommends:

81. *that further study be conducted as to whether the existing provisions adequately protect the personal privacy concerns and interests in architectural drawings and building plans and, if necessary, that appropriate recommendations for amendment to the Act be presented to protect these interests.*

Plain Language

A number of witnesses complained that the Act is overly technical and difficult to understand. Section 14, in particular (the personal exemption provision) was criticized as being awkwardly drafted and cumbersome in its use of double negatives.

According to the Plain Language Centre of the Canadian Law Information Council, one quarter of Ontario's population has difficulty reading. This difficulty is amplified when people have to use instruction manuals, application forms, reports and legal documents. Thus, overly technical and difficult to understand language in the Act creates barriers to its effective use by a large segment of the population.

Plain language is described as language that the public can understand. It is language that is clear, concise, accessible and faithful to its purpose. The use of plain language is becoming more routine for government documents. The Government of Ontario now has a plain language adviser and may ministries are converting documents to plain language.

The Committee believes that rewriting the Act in plain language will simplify the statute making it more understandable and potentially more efficient for all users.

The Committee, therefore, recommends:

82. that the Act be rewritten in plain language.

Legislative Review

Section 55 of the Act requires the Standing Committee on the Legislative Assembly to conduct a comprehensive review of the Act and to make recommendations to the Legislative Assembly regarding amendments to the Act. The review is time limited in that it must be commenced before January 1, 1994 and must be completed within one year of beginning the review. There is no provision for any further review of the legislation.

In the Committee's view, all of the evidence received indicates that the Act is working reasonably well and the purposes of the Act are being met. However, there are instances where the legislation needs to be updated to reflect current and

future advances in technology and changes in government priorities and in public expectations. The Act provides the legislative framework for access to government records and the protection of personal information. However, as demonstrated by the changing nature of the issues and concerns raised in the previous review and those in the current review, the nature of access and privacy issues is constantly evolving and changing.

In the 1991 review, the Committee recommended that the provincial Act be further reviewed within three years. The Committees's rationale was as follows:

> The Committee believes that several important issues of immediate concern were raised during the course of the Committee's review. In addition, a number of long term issues were identified . . . . In light of the many emerging information and privacy issues, and the fact that the Act is still in its infancy, the Committee believes it would be worthwhile to assess the operation of the Act in another three years.

Because the two Acts are similar in structure and share many of the same provisions, it is logical and expedient to consider both pieces of legislation together, rather than to require consequential amendments to each following separate reviews.

The Committee, however, wants to ensure that these reviews are meaningful, responsive to the issues and result, where appropriate, in legislative change. For this reason, the Committee believes that the legislative review should include a draft bill from the Committee for consideration by the Legislative Assembly.

The Committee, therefore, recommends:

83. *that section 55 of the Act be amended to require the Standing Committee on the Legislative Assembly to conduct a comprehensive review of both the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act five years from the date of the enactment of substantial changes to either statute; and that the*

review include the Committee's draft amendments and, where appropriate, draft bill for consideration by the Legislative Assembly; and

84. *that the consequential amendments to implement the foregoing recommendation be made to the provincial Act.*

LIST OF RECOMMENDATIONS

1. that coverage of the province's freedom of information and protection of privacy statutes be extended to hospitals, universities, social service agencies and other public bodies that are receiving significant public funding or performing public functions but that are not currently covered by the legislation; and

2. that public consultations be undertaken with such public organizations including public hospitals, universities and children's aid societies to assist in the process of identifying possible barriers to extending coverage and to ensure the most appropriate, efficient and cost effective methods of implementing the foregoing recommendation. (11)

3. that section 1 of the Act be amended to include the following new provision:

> "to make public bodies more accountable to the public." (12)

4. that section 1 of the Act be amended as follows:

1. The purposes of this Act are,

(a) to provide a right of access to information <u>in the custody or under the control</u> of institutions in accordance with the principles that, . . .

> (iii) decisions on the disclosure of information should be reviewed independently of the institutions <u>which have the custody or control</u> of the information;

(b) to protect the privacy of individuals with respect to personal information about themselves <u>in the custody or under the control</u> of institutions and to provide individuals with a right of access to that information. (13)

5. that the Act be amended to specifically exempt from disclosure the personal notes and files of elected officials where those notes are used for their personal use and are not integrated into the institution's files. (15)

6. *that the term "substance of deliberations" in subsection 6(1)(b) be defined to include "all records that are submitted to a body for the*

purpose of the in camera session and which form the basis of the actual discussions." (17)

7. that the 20 year exemption period in section 6(2)(c) be reduced to 15 years. (17)

8. that section 7(2) of the Act be amended by adding "public opinion research" and "economic forecasts" to the list of types of information that are not included in the exemption under section 7(1); and

9. that the 20 year exemption period in section 7(3) be changed to 15 years. (19)

10. that section 8(4) of the Act be amended as follows:

> (4) Despite any exemption, a head shall disclose a record that is a report prepared in the course of routine inspection by an agency that is authorized to enforce and regulate compliance with a particular statute of Ontario. (22)

11. that section 9 of the Act be amended to provide for a time limit of 15 years after which records must be disclosed. (23)

12. that section 10(2) of the Act be amended to state:

> A head shall disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure. (24)

13. that section 12 of the Act be amended to extend the exemption to cover the confidential communications between municipal police forces and Crown counsel; and

14. that the Committee's recommendation #16 in the 1991 Report be amended to reflect this proposed change to section 12 of the municipal Act. (26)

15. that section 13 be amended by adding a subsection 13(2) as follows:

> (2) a head may refuse to confirm or deny the existence of a record to which subsection (1) applies. (27)

16. that section 14 of the Act be restructured to make it easier to understand and apply. In particular, section 14 should state simply

that the head of an institution must refuse to disclose personal information to any person except to the person to whom the information relates "if the disclosure would constitute an unjustified invasion of personal privacy." In addition, section 14 (4) should be revised to include the five circumstances set out in the current sections 14(1)(a) through (e). (29)

17. that section 14 be amended to reduce the number of categories of personal information, the disclosure of which is presumed to be an unjustified invasion of personal privacy by permitting the balancing of criteria set out in section 14(2) with section 14(3) to rebut the presumption in section 14(3). Such amendment should be drafted carefully to safeguard the privacy interests protected by the Act and with a view to addressing specific identified problems rather than be a blanket rebuttal of the section 14(3) presumption; and

18. that any amendment to section 14 take into account recent legislative schemes designed to make it possible in certain circumstances for a person to have access to personal information about another individual to make personal care, property and medical decisions for that individual. (31)

19. that section 14(3)of the Act be amended to provide that

> 14(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (i) consists of an individual's name, address or telephone number and is to be used for mailing lists or solicitation by telephone or other means.

and that further consideration be given as to how the provision can be enforced effectively. (34)

20. that the Act be amended to require institutions to routinely publish, at least annually, the actual compensation paid to elected officials and the actual compensation paid to public service employees earning in excess of $50,000 per annum in salary and benefits; and

21. that institutions also be required to routinely publish the financial details of personal service contracts and that further consideration be given as to how often and in what format the routine publication should be made. (36)

22. that the Act be amended to ensure that the section 6 exemption cannot be used to shelter the financial terms of retirement, severance and termination benefits paid by institutions; and

23. that the effects of this amendment on the negotiation and terms of severance and retirement agreements be further investigated and addressed in ways that do not impair the routine disclosure of the financial terms of such agreements. (38)

24. that section 15 of the Act be amended as follows:

> 15. A head may refuse to disclose a record if,
>
> (a) the record or the information contained in the record has been published or is currently available to the public, and the head has informed the requester of the specific location of the record or the information contained in the record. (39)

25. that section 15 be amended to prevent an institution from relying on section 15(b) more than once in respect of a record; and that the following section be added:

> 15(2) Where a head refuses to disclose a record or the information contained in the record under clause (b) and subsequently learns that the record will not be published as scheduled, the head shall immediately give the person who made the request, written notice in accordance with section 19. (40)

26. that the workability of section 16 be re-examined with a view to clarifying the operation of the section and by defining the term "compelling public interest;" and

27. that a thorough examination of the implications of extending the application of the public interest override provision to the three exemptions that currently are not subject to the override be undertaken before any such amendment is considered. (43)

28. that subsection 17(2) be amended as follows:

> 17(2) If the request does not sufficiently describe the record sought, the institution shall inform the person seeking access of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1). (43)

29. that section 18(3) be amended by substituting the word "may" in line 4 with the word "shall," thereby imposing a positive obligation on the head to transfer the request; and

30. that sections 18(2) and 18(3) be amended to require that prior written consent of the requester to transfer or forward the request to another institution and that the time period specified in the section be suspended pending receipt of the consent or the passage of a specified reasonable time period. (45)

31. that sections 22(1)(b) and 22(3) be amended to read

22(1) Notice of refusal to give access to a record or part under section 19 shall set out,

(b) where there is such a record,

(i) a description of the record,

. . . .

22(3) A head who refuses to disclose a record or part under subsection 21(7) shall state in the notice given under subsection 21(7),

(a) a description of the record or part thereof;

. . . . (46)

32. that the following subsection be added to section 22:

22(5) Where a head fails to give notice required under section 19 or subsection 21(7) concerning a record, the Commissioner may, on appeal, require the head to waive payment of all or any part of an amount required to be paid by the person who made the request for access to the record. (48)

33. that the Act be amended to provide increased access to persons who are print handicapped through alternative formatting of general records and personal information;

34. that the fees for providing records in alternative formats should not exceed the fees charged for providing the information in print format; and

35. that further consideration should be given to the cost implications of these amendments to ensure that they can be implemented in the most cost efficient but effective manner. (51)

36. that section 23 of the Act be amended to provide an explicit obligation for the institution, whenever possible, to provide access in the medium specified by the requester, unless it would be unreasonable to do so. (52)

37. that section 27 of the Act be amended to require that records containing personal information can be designated as a public record only by statutory authority, not by policy. (53)

38. that section 27 of the Act be amended as follows:

    27. This Part does not apply to personal information maintained by an institution for the purpose of creating a record that is available to the general public. (54)

39. that the term "collect" be defined for the purpose of Part II of the Act. The definitions should provide that for personal information to be collected, the institution would have to retain recorded information in an organized fashion so that only those records which are reasonably retrievable by the institution have been "collected" within the meaning of the Act. Information which is received, but not retained beyond the time necessary for a decision to be made not to retain it, should not be considered to have been collected. Furthermore, information retained in an organized fashion would be considered to have been collected regardless of whether it was unsolicited or solicited by the institution and regardless of the manner of collection, whether direct or indirect. (56)

40. that subsection 29(2)(a) be amended to state:

    29(2) If personal information is collected on behalf of an institution, the head shall inform the individual of whom the information relates of,

    (a) the specific legal authority for the collection. (57)

41. that an amendment be made to the appropriate statute to clearly set out the authority of schools to collect and maintain student health card numbers. (58)

42. that section 30 of the Act be amended to add the following provision:

    An institution shall ensure that personal information in its custody or under its control is protected by such security safeguards as are

reasonable in the circumstances to prevent loss or unauthorized access, use, modification or disclosure. (59)

43. that section 30(4) be amended as follows:

> 30(4) A head shall dispose of personal information in the custody or under the control of the institution in accordance with the regulations. (60)

44. that sections 31 and 32 be amended to read as follows:

31. An institution shall not use personal information in its custody or under its control except,

> (a) if the individual to whom the information relates has identified that information in particular and consented to its use;

32. An institution shall not disclose personal information in its custody or under its control except,

> (b) if the individual to whom the information relates has identified that information in particular and consented to its disclosure. (61)

45. that section 32(a) be amended to clarify that the section applies only in the context of a request for access to personal information under Part I of the Act. (62)

46. that section 33 be amended by deleting the reference to directly collected information and instead providing that the purpose of a use or disclosure of personal information is a consistent purpose under sections 31(b) and 32(c) only if the purpose has a reasonable and direct connection to the original purpose. (63)

47. that section 32 of the Act be amended to include a provision stipulating that disclosure of personal information to persons providing services to government institutions is only permissible under terms and conditions similar to those applying to the conditions for research agreements set out in section 14(1)(e). (63)

48. that Management Board Secretariat specifically target and direct public education and awareness programs to the education sector with a view to addressing the concerns expressed in this report regarding the application of the privacy provisions of the Act to school boards and the interrelationship with the other education-related statutes; and

49. *that Management Board Secretariat immediately undertake a review of the unique privacy needs of school boards, including the provisions of the existing education-related statutes, to determine how these needs may be more appropriately met in the context of the Act or, if necessary, outside the Act.* (66)

50. that recommendations 39 - 42 of the 1991 Report of the Standing Committee on Legislative Assembly on the Freedom of Information and Protection of Privacy Act, 1987 be incorporated as amendments to MFIPPA. (71)

51. that the Information and Privacy Commissioner should immediately engage in an investigation of the practices of welfare delivery in unconsolidated municipalities to determine whether all possible steps are taken to ensure confidentiality. (72)

52. that section 39 of the Act be amended by adding the following subsection:

39(2a) The Commissioner may extend the 30 day time period referred to in subsection (2) where special circumstances exist. (73)

53. that section 39(3) be amended to read as follows:

39(3) Upon receipt of a notice of appeal, the Commissioner shall inform the head of the institution and <u>may inform</u> any of the following:

(a) the requester;

(b) any person who was given notice of the request under section 21(1); and

(c) any person who should have been given notice of the request under section 21(1) if the head had intended to grant access to the record,

of the notice of appeal. (75)

54. that Management Board Secretariat and the Information and Privacy Commissioner evaluate as quickly as possible the delay-cutting initiatives of the Information and Privacy Commissioner and that they continue to aggressively monitor the appeal process to ensure that cases are being dealt with expeditiously. (77)

55. that section 41(6) be amended to read:

41(6) Despite section (4), a head may require that the examination of a record by the Commissioner be of the original at its site <u>where it would</u>

not be reasonably practicable to reproduce the record or a part thereof by reason of its length or nature. (78)

56. that section 46 be amended by adding the following:

46. The Commissioner may

(ia) upon receipt of a complaint, conduct a review of the access procedures of an institution or review of records of personal information in the custody or under the control of the institution for the purpose of ascertaining whether the institution is complying with the requirements of the Act.

(iia) upon receipt of a complaint, investigate an act or practice of the institution that may breach a privacy principle of this Act.

46a(1) For the purposes of the performance of the Commissioner's function under subsection 46(ia) or subsection 46(iia) of the Act, an employee of the Commissioner, authorized by the Commissioner for the purposes of this section may, at any reasonable time of the day, after notifying the head of the institution of his or her purpose, enter the premises occupied by the institution and inspect any records that are kept at those premises and any systems and procedures that are in place at those premises and that are relevant to the performance of the function.

(2) The head shall provide the authorized person with all reasonable facilities and assistance for the effective exercise of his or her function under subsection (1). (81)

57. that section 46(b) of the Act be amended to state:

46. The Commissioner may, . . .

(b) after hearing the head, order an institution to

(i) change or cease a collection, use, retention, disclosure or disposal practice, and

(ii) destroy collections of personal information, that contravene this Act. (82)

58. that the Act be amended and the relevant regulations be introduced as follows:

- add a new subclause (c) as follows:

47. The Lieutenant Governor in Council may make regulations,

(c) respecting the standards for privacy protection and access to records maintained electronically.

The present sections 47(c) through (l) would become sections 47(d) through (m);

- a regulation be introduced regarding access to government-held information as follows:

  When records maintained electronically include items of information that would be available under the Act, an institution in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the retrieval and severance of available items in order to foster maximum public access;

- a regulation be introduced requiring institutions to conduct a privacy impact assessment, as defined in the regulation, prior to the introduction of any computer information system and to request the Commissioner's comments on the access and privacy implications as may be required; and

59. that section 46(a) of the Act be amended to authorize the Commissioner, if asked by the institution, to offer comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of the institution. (85)

60. that Management Board Secretariat review the effectiveness of the new directive and guidelines on computer matching before further consideration is given to adapting them to the institutions covered by the Act. (87)

61. that subsection 54(a) be amended to ensure that family members and others with a legitimate interest are given greater access to the deceased person's personal information in a way that does not require the formality of court appointment and that is not limited to situations involving administration of the deceased person's estate. (92)

62. that Management Board Secretariat continue to assist institutions to ensure greater understanding of these statutory provisions; and

63. that an amendment be made to the Act or other appropriate legislation to ensure that where a student is receiving social assistance and school attendance is a condition for ongoing entitlement, the social assistance agency has the right of access to the student's school attendance record,

without the student's consent, to verify that the condition is being met. (94)

64. that section 54(c) be amended as follows:

54. Any right or power conferred on an individual by this Act may be exercised,

(c) where the individual is less than sixteen years of age, by a person who has lawful custody of the individual if the exercise of the right or power is in the best interests of the individual. (95)

65. that section 47 of the Act be amended to include the following provision:

47. The Lieutenant Governor in Council may make regulations,

designating classes of records that are in the custody or under the control of institutions which are to be routinely disclosed to the public, on a periodic basis, in the absence of any request being made under the Act;

66. that regulations designating records as subject to routine disclosure should only be made on the advice and after consultations with the affected institutions and other interested parties; and

67. that section 25 of the Act (Information available for inspection) be amended to include records or classes of records that are designated by regulation to be subject to routine disclosure. (98)

68. that the following provision be included in the Act:

- the head of an institution may apply to the Commissioner for an order authorizing the institution to disregard the request for access on the basis that the request is frivolous or vexatious;

- the application shall be made on written notice to the person seeking access within seven days after receiving the request; and

- the notice shall set out the reasons for the head's application, the date of the application and shall identify the requests affected by their date. (102)

69. that the Act and regulations be amended to require the payment of a nominal fee of $5 for each request for access, except for a

request for access to records which are designated by the Act or regulations to be subject to routine disclosure; and

70. that, if the cost of reproduction of the record is less than the request fee, the institution be permitted to charge only the lesser amount. (103)

71. that the Act be amended to provide that an appeal is subject to a filing fee of $25. (104)

72. that the Act be amended to give the Information and Privacy Commissioner the authority to award costs of the appeal against any party, who in the opinion of the Commissioner, has unreasonably and without good cause pursued the appeal or failed to comply with the Act. (105)

73. that section 45(2) of the Act be amended to provide:

45(2) Despite subsection (1), a head shall not require an individual to pay a fee for access to his or her own personal information, except where the information has already been provided to the requester, the head shall require the individual to pay the full actual costs of reproduction for any subsequent request for the same personal information. (109)

74. that the Act be amended to provide that every request for information will be presumed to be a request for commercial purposes and as such will be subject to the actual costs incurred in reproducing the requested record. In order to avoid the fees the requester would have to show that the request is not for commercial purposes. Regulations should designate certain classes of requests and requesters that will be exempt from the presumption including, for example, requests by elected officials; government agencies, boards and commissions; the media and others where the request is in the public interest. (110)

75. that subsection 45(1) be amended as follows:

45(1) Where no provision is made for a charge or fee under any other Act, a head shall require the person who makes the request for access to a record to pay costs no greater than the following, . . . ; and

76. that subsection 45(1) be amended as follows:

(a) a search charge for every hour of manual search required in excess of two hours to locate the record;

. . .

(c) computer and other costs incurred in locating, retrieving, processing and copying the record; (111)

77. that subsection 45(5) be amended as follows:

45(5) A person who is required to pay a fee under subsection (1) may appeal to the Commissioner for a review of the amount of the fee or the head's decision not to waive the fee. (111)

78. that section 45 of the Act be amended to require institutions to provide requesters with a notice of the right to appeal the amount of the fee or a refusal of fee waiver. (112)

79. that the Act be amended to provide that

(a) all general records that have been transferred to a government institution's archives be made available to the public after a specified period of time after the creation of the record and this period should not exceed 20 years.

(b) all records containing personal information that have been transferred to a government institution's archives be made available to the public 100 years after the creation of the record.

In the event time restrictions of less than 20 years are adopted for the exemptions to the Act, the Act should ensure that records transferred to the archives of a government institution are released in accordance with the time restrictions applicable to the exemption; and

80. that subsection 52(2) of the Act be amended as follows:

52(2) This Act does not apply to records placed in the archives of an institution by or on behalf of a person or organization other than an institution. (115)

81. that further study be conducted as to whether the existing provisions adequately protect the personal privacy concerns and interests in architectural drawings and building plans and, if necessary, that appropriate recommendations for amendment to the Act be presented to protect these interests. (119)

82. that the Act be rewritten in plain language. (120)

83. that section 55 of the Act be amended to require the Standing Committee on the Legislative Assembly to conduct a comprehensive review of both the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of

Information and Protection of Privacy Act five years from the date of the enactment of substantial changes to either statute; and that the review include the Committee's draft amendments and, where appropriate, draft bill for consideration by the Legislative Assembly; and

84. that the consequential amendments to implement the foregoing recommendation be made to the provincial Act. (122)